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IN THE

SUPREME COURT OF THE UNITED STATES.

WARREN B. WILSON, *Appellant,*

vs.

LESLIE M. SHAW, Secretary of the Treasury; THE REPUBLIC OF PANAMA; THE NEW PANAMA CANAL COMPANY OF FRANCE, *Appellees.*

No. 43

Appeal from the Court of Appeals of the District of Columbia.

Appellant's Brief.

WARREN B. WILSON,
SOLICITOR *pro se.*

BARNARD & MILLER, PRINT, CHICAGO.

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WARREN B. WILSON,
Appellant,
vs.
LESLIE M. SHAW, Secretary of the Treasury; THE REPUBLIC OF PANAMA; THE NEW PANAMA CANAL COMPANY OF FRANCE,
Appellees.

Appeal from the Court of Appeals of the District of Columbia.

APPELLANT'S BRIEF.

This case is made by a bill filed in the Supreme Court of the District of Columbia by appellant, a citizen, owner of property and taxable inhabitant, praying an injunction to restrain the appellee, Leslie M. Shaw, secretary of the treasury, from paying any money out of the treasury in the purchase of property or in the construction of the canal at Panama and from borrowing money on the credit of the United States or issuing bonds or making any payments under the assumed authority of the act of congress approved June 28, 1902, for the acquirement of property and rights from Colombia and the Canal Company and for the construction and operation of the canal and railroad.

The bill avers:

1. That the complainant is a citizen of Illinois and of the United States, the owner of property in the United States subject to taxation by the United States and a taxable inhabitant of the United States.

2. That the defendant is Secretary of the Treasury and as such has the custody and control of over $60,000,000 public money derived from taxes, money borrowed and proceeds of the disposition of the territory and other property of the United States.

3. That no treaty has been made with Colombia.

4. That the people on the Isthmus rebelled and established an independent republican government with which the treaty set out in the bill *in haec verba* was made.

That Panama is a republic, its government republican in form; that the persons representing Panama in making the treaty had the same power to act for and bind Panama by treaty that the president and senate have to act for and bind the United States.

"That the legal effect in the territory of the Republic of Panama of this or any treaty executed by the said representatives of Panama is the same as the legal effect in the territory of the United States of a treaty in like terms made on behalf of the United States by the president and senate."

That no treaty has been made with Colombia and the things required by the act to be acquired from Colombia have not been acquired at all except such as are claimed to have been acquired by the treaty with Panama; that the entire Isthmus is outside the territory of the United States.

5. That a contract has been made with the Canal Company for acquiring their property and rights at $40,000,000.

That the President is about to issue his warrants as provided by the act for the ten and forty million dollars to Panama and the Canal Company, respectively; that

large expenses are being incurred in construction of the canal; that the defendant is publicly giving out that he will pay the ten and forty million and construction expenses and unless restrained will pay out said sums and the full ten million the act purports to appropriate for construction and will borrow $130,000,000 and issue bonds therefor; that the expense of construction will be more than ten million and the full amount of one hundred and thirty million the act purports to authorize to be borrowed.

7. That there is no appropriation by law for any such payments or authority for bond issues except that claimed under act of June 28, 1900.

8. That said act is wholly unauthorized by the constitution, null and void; that the treaty is wholly unconstitutional and invalid, both in Panama and the United States; that if the act were valid its terms and conditions have not been complied with and if any such payments are made it will be in violation of the provision of the constitution, that no money shall be drawn from the treasury but in consequence of appropriations made by law.

That the Secretary of the Treasury is giving out that said act is a valid act and gives authority for such payments and bond issues and unless restrained will make them; that the Secretary of the Treasury is not a person of sufficient substance to make good said sums or any considerable part thereof, and if said payments or any of them are made the amounts of such payments will be wholly lost.

That the President fully approves the course of the Secretary of the Treasury, and any application for leave to prosecute in the name of the United States this or any suit asking like relief would be unavailing.

Prays an injunction against making any payments for purchase or construction or under the assumed authority of the act of June 28, 1902 and against borrowing money or issuing bonds.

The transcript of the record shows more fully the averments of the bill.

To this bill a demurrer was filed by the Secretary of the Treasury:

1. For want of equity.

2. That the defendant is sued as an officer of the United States and not as an individual.

3. The complainant has no interest in the matter.

4. That Panama is a foreign nation and cannot be sued.

5. That the United States has an interest in the matter, but is not and can not be made a party.

The questions involved are:

1. Whether the act of June 28, 1902, or any other legislation properly construed purports to authorize the payments or bond issues.

2. Whether if it does intend to authorize these things the legislation is constitutional.

3. Whether the complainant has the necessary special interest in the question to enable him to maintain the bill.

4. Whether the United States is a party or if not whether it has such an interest in the question that the suit can not be prosecuted without making it a party.

The questions are raised by the demurrer of the Secretary of the Treasury to the bill and by the ruling of the court below sustaining the demurrer and dismissing the bill for want of equity.

The last named rulings are the errors assigned and relied on.

I.

The grounds of demurrer assigned raise some preliminary questions:

1st. That the Republic of Panama, as a foreign nation, cannot be made a defendant.

The importance of this question has disappeared since the suit was brought, but the practice followed here in cases where a foreign sovereign is interested in the subject-matter of a litigation in any chancery court is the approved one. The foreign sovereign should be made a party that it may, if it so desires, appear and be heard, though it cannot be compelled to appear. The court will, however, proceed to final decree against the persons and property whom it can reach, even though the foreign sovereign should not elect to submit to its jurisdiction.

Daniel Chancery Practice, Vol. 1, pp. 141, 142.

2nd. That the defendant is made defendant as Secretary of the Treasury, and this is the equivalent of a suit against the United States.

3. That the United States has an interest in the controversy, but is not and can not be made a party.

4. That the complainant has not the necessary interest to enable him to maintain the bill.

This question is whether, conceding the right there is *any* remedy, for if this bill cannot be sustained there is no remedy in any case, however serious, to prevent an unlawful spoliation of the treasury by dishonest or mistaken officials.

This objection assumes, of course, that the position of complainant is well taken; that the threatened payments and bond issues complained of are unlawful. The question then is whether, when the custodian of the public funds is about to withdraw money from the treasury without an appropriation made by law, there are any lawful means by which it can be prevented; or whether citizens and the courts are obliged to stand by while dishonest, ambitious or mistaken officials waste the public funds in unlawful speculations.

This is not an open question. Private citizens under such circumstances occupy exactly the position of stockholders in private corporations, when the officials having control of them themselves proceed to misapply the assets, and when, therefore, a suit in the name of the corporation cannot be prosecuted.

Dillon's Mun. Corp., Section 915.

In this case it is averred in the bill that the President fully approves the course of the Secretary of the Treasury in the matters complained of, issuing his warrants, etc., and, of course, any application for leave to prosecute in the name of the United States this suit or any seeking similar relief would be unavailing. (Rec., .)

Every principle involved in this objection has been long ago fully adjudicated. The objections urged here are the same, which from the beginning have been brought against the jurisdiction of equity in all cases of this character.

First: That a private citizen has not the necessary interest in the subject-matter of the controversy.

Second: That a suit against executive officials to coerce the performance of their official duty is in sub-

stance a suit against the state or nation whose officials they are.

Third: That a decree in such a case is an improper interference by the courts with matters committed by the law to other departments of the government.

But these questions are fully settled. It was for a long time vigorously insisted by the heads of departments of the Federal Government that a suit by an individual against any one of them was in substance a suit against the United States, and a decree against him, requiring the performance of an official duty, was such an interference with a co-ordinate department of the government.

But this has been overruled, and the doctrine fully established that in proper cases, compulsory process, both mandamus and injunction may be issued by the courts at the suit of private persons interested, to require such officials to do or refrain from doing, in their official capacity, things which the court can see it is their positive legal duty to do or not to do.

Marbury v. *Madison*, 1st Cranch, 137.
Kendall v. *United States*, 12 Peters, 524.
United States v. *Schurz*, 102 U. S., 378.
United States v. *Black*, 128 U. S., 40.
United States v. *Bayard*, 4th Mackey, 312.
Noble v. *U. R. L. R. R. Co.*, 147 U. S., 165.

That a bill to restrain an unlawful disbursement of public funds or issue of public obligations is a proper case and a private citizen has the necessary special interest to enable him to sustain such a bill as the present, is also clear.

Crampton v. *Zabriskie*, 101 U. S., 601.
Dillon on Mun. Corp., Sections 914 to 923.
Louisiana Board v. *McComb*, 92 U. S., 531.

Rippe v. *Becker*, 56 Minn., 100.
Pennoyer v. *McConnaugh*, 140 U. S., 1.
Burke v. *Snively*, 208 Ill., 320.
The Liberty Bell, 23 Fed. Rep., 831.

The case of *Burke* v. *Snively*, 208 Ill., 320, recently decided in the Supreme Court of Illinois, is on the present point, a singularly exact precedent. An act was passed by the legislature of Illinois appropriating $152,000 for the maintenance of the Illinois and Michigan Canal. A bill was filed by a citizen to enjoin the treasurer of state and other state officials having control of the public funds from paying out the money. The court held the statute unconstitutional, and that an injunction should issue.

> "An unconstitutional statute is not law, and an appropriation of public funds, in pursuance of an unconstitutional statute, is a misuse of the funds, which may be restrained by injunction." (Page 337.)

Of course, the reasoning by which it was established, that that statute violated the Constitution of Illinois, is not the same as that by which it is sought to establish that the payments and bond issues here complained of are unlawful. But, if it is held, that these payments, etc., are unauthorized, then that case is an exact precedent on this branch of the case, *i. e.*, that such unlawful disbursements of the public funds may be enjoined in such proceedings as the present.

It is true, that the Secretary of the Treasury, or other custodian of the United States money, was not the particular defendant in any of these cases, where unlawful payments or bond issues have been restrained, but the adjudications have been made, against state officials

occupying in the State governments, positions exactly analogous to that occupied by the Secretary of the Treasury in the Federal Government. There is no possible difference in principle between a state and a federal official in this respect.

It is equally improper to allow an officious intermeddler to control through the Chancery Courts, the acts of a state official in a matter where he has no concern, as to allow him to control the acts of a federal official in the same way under like circumstances.

A suit in substance against a state is just as unlawful, as a suit in substance against the United States.

United States v. *Lee*, 106 U. S., 196–206.
Tindal v. *Wesley*, 167 U. S., 204, p. 213.

The lawful discretion of the officials of the executive department of a state government, can no more lawfully be controlled by the courts than the lawful discretion of the like officials of the Federal Government. The distinction between cases in which compulsory process will, and those in which it will not issue, does not at all depend on who may be defendant or what position he holds, whether in a state or federal or municipal government or in a private corporation, but on the nature of the act sought to be controlled. It being once established that the heads of departments are subject to writs of injunction or mandamus, the question, whether in any given case the writ should or should not issue, depends wholly on whether the thing, as to which, the conduct of the defendant, is sought to be controlled, is a matter as to which the defendant has a positive duty to do or not to do, as the case may be, the particular thing in question, or whether the law has given him a discretion, to do or not to do the thing, as he thinks best.

It is, however, claimed that the complainant has not the necessary interest; that while such a bill may be maintained by a private person who shows the requisite interest, it is not shown that the complainant is such a person; that while such a person as complainant has an interest in the treasury of the state where he lives and is injured by its waste, he has no such interest in the United States treasury and is not harmed, and has no right to complain if it is unlawfully thrown away.

The averment of the bill is that the complainant "is a citizen of the United States of America, and of the State of Illinois, residing in the State of Illinois; that he is the owner of property in the United States of America and a taxable inhabitant of the United States of America." (Rec., 2.) The objection taken is, that it should be further shown that the complainant's property or occupation is such as under existing laws is not merely taxable, but taxed, and that the complainant is actually paying taxes to the United States, *i. e.*, that he not merely is liable to be called on hereafter to make good the waste complained of, but has contributed directly to the particular fund wasted.

But this position is not tenable.

It is not averred that complainant is a distiller or saloonkeeper or tobacco dealer or an importer, nor is it believed such an averment would add to his rights, nor that these are the only persons who are the beneficiaries of the trust upon which the Secretary of the Treasury holds the public funds.

The leading objection, that has from the beginning been urged against this whole jurisdiction, against State and Municipal, and all other officials, is this alleged want of special interest in the private person complainant, the interest and injury being always claimed to be in the state or municipality or nation, as the case might be. But that interest has been found to exist in the private citizen, and that interest is held by the complainant under the averments of this bill. Even the averment of the ownership of property is superfluous, but inserted out of abundant caution. That interest, or special damage rather, is the legal liability of the complainant to be called on by the tax paying authority (whether Congress, State legislature or City Council) to pay taxes to make good the shortage, or to pay the debts, brought about by the unlawful waste of the public funds, or issue of the public obligations, that larger sums are or may be required of him, than if the treasury had not been lawlessly depleted of the funds already provided.

The interest is this, as defined by Judge Dillon in a discussion cited with approval by the Supreme Court of the United States, in *Crampton* v. *Zabriskie, supra:*

> "When the amount, thus misappropriated is subsequently needed for legitimate purposes, the citizen cannot resist the necessary tax to raise the same, because, the corporation had, at a prior time, misappropriated the money."
>
> Dillon on Mun. Corp., 917.

Not that the complainant contributed to the treasury any part of the fund being dissipated without lawful authority. That fund may have been raised, by sale of public property, by borrowing, or by excises or imposts the particular complainant may not have had occasion to pay. But that is not material. Money once paid into

the treasury by a tax payer belongs no more to him than to any other citizen. No one ever heard of a bill to enjoin the misapplication of the special part of the fund paid into the treasury by the particular complainant. The effect upon taxes to be paid in the future, resulting from the lawless waste of the money in the treasury, is exactly the same, whether the money misapplied was raised in one way or in another.

Nor is it material, whether under existing laws, complainant pays much or little or any taxes into the treasury. New taxes may be imposed or old ones extended to new classes of persons. It is exactly this possibility or practical certainty of change in the tax levies, that makes in any case, state or federal, the injury to a private person. If the existing system of taxation both in the subjects and methods and amounts were permanent, there would, of course, be no possibility that the individual citizen would have this special damage from the misapplication of any public funds, municipal, state or federal; but it may be changed, constantly is changed, and in this fact lies the injury. The money to replace that, wrongfully wasted, or to pay the debts unlawfully made, must be raised by taxes. This may be done by increasing the amounts demanded of the same classes now contributing, or by levying on other persons and subjects. As, however, the limit has been practically reached, on whisky, tobacco and import duties, it is a practical certainty, if these expenditures are allowed that the money will have to come from other sources. There is no legal certainty how it will be done. There is no technical certainty when money is unlawfully drawn from any public treasury, municipal, state or national, that any particular individual will have his taxes directly increased.

So, here, whether the deficit caused by making the payments for purchase and construction of the canal, issuing bonds, etc., will be made good by an additional tax upon whisky and tobacco, or by stamp duties on checks, deeds, mortgages or occupations or by capitation or direct taxes, cannot be known certainly. But this same uncertainty exists, as to state and municipal taxation, but is not held to destroy the special interest of a citizen to enjoin misapplications of the funds in those treasuries.

Who, then, are the private individuals who possess this requisite interest? Not the individuals who have paid taxes. A tax payer paying taxes into the treasury has no further title to that money different from any other citizen. Not those, who will certainly have their taxes increased by the illegal acts complained of, for there are no such individuals in any case, municipal, state or national. But those who *may* have their taxes increased, all who are legally liable to be called on by the legislature or Congress, or other tax laying power. As Judge Dillon expresses it: "A taxable inhabitant," not a taxed inhabitant. The bill, it will be noticed, is framed in this language. The complainant is alleged to be a taxable inhabitant.

It should be noted that this discussion by Judge Dillon, in which the party interested, is defined as a "taxable inhabitant," has been cited with approval by the Supreme Court.

Crampton v. *Zabriskie,* 101 U. S., 601.

The courts in passing upon the question of the right of individual complainants, have used loosely numerous terms to describe them as tax-payer, citizen, property-owner, taxable inhabitant, usually adopting the term in which the particular complainant describes himself. Thus

in The Liberty Bell, 23 Fed. Rep., 830, the complainant called himself a "resident tax-payer," and that term was followed. But the cases did not make necessary any definition of the particular classes allowed to sustain such suits, only in each case hold the particular complainant qualified. In no case has any one been excluded who could show a legal liability to be taxed, except in the few early cases where the right of any private individual was denied, and the right held to be in the state or municipality alone.

There is no difference whatever between the legal effect upon a private citizen of the misapplication of money in a state or federal treasury. The tax laying authorities of both governments have exactly the same discretion in selecting the subjects and manner of taxation to raise the money to make good the deficit, except in the matter of import duties.

The fact that the two governments have, in times past, shown a preference for different forms of taxation is not important. If the uncertainty whether the federal government will or will not require the complainant to contribute directly by capitation or direct taxes, or by stamp duties upon his occupation or upon transactions in which he may engage is enough to show the lack of special interest in this question and hence defeat his right to maintain this bill; the same uncertainty as to the course to be taken by any state government would defeat the right to maintain the bill against any state official.

The objection is not peculiar to federal officials, but an attack as already indicated on the whole jurisdiction in any case. It may be, that this is not theoretically as definite a thing as is required in some other kinds of litigation. Yet, the damage is practically so sure, and

the entire absence of other remedy so apparent, that this legal liability to increased taxation has been fully established, as a sufficient basis for such a suit as the present. *Crompton* v. *Zabriskie*, settles the whole question.

II.

The suit is not a suit against the United States.

The cases already cited and the practically uniform course of authority, establish that suits of this character to restrain public officers from misapplying public money are not open to any other objection. The state, or the United States, as the case might be, have, of course, an interest in the question whether the funds in the treasury shall be preserved for lawful uses or wasted in unlawful uses, and in a similar case a private corporation would be made defendant.

But the legal impossibility of making the state or United States a party in such cases does away with the necessity and a decree may be had against the official.

Osborn v. *Bank of U. S.*, 9 Wheat., 738.
Davis v. *Gray*, 16 Wall., 203.
Dodge v. *Woolsey*, 18 How., 331.
Allen v. *B. & O. R. R. Co.*, 114 U. S., 311.
Virginia Coupon cases, 114 U. S., 269.
U. S. v. *Lee*, 106 U. S., 196, pp. 212-215.
Tindal v. *Wesley*, 167 U. S., 204.

It is not believed this will be seriously disputed. But it is argued that conditions have changed since the suit was brought, and that any decree entered now would violate the rule: that the court should take judicial notice that since the suit was brought the ten and forty millions

have been paid, respectively, to Panama and the Canal Company; that the United States has acquired title to some property, and this is now, therefore, a suit to prevent the United States from "improving its property," the case in its changed form being governed by *Belknap* v. *Schild*, 161 U. S., 17 and *International Supply Company* v. *Bruce*, 194 U. S., 601. But these cases have no bearing on this question.

They were bills by patentees to restrain government officers from using government property in legitimate government service, on the ground that the complainant had a patent on the devices. The court held that the property (in one case a caisson gate in actual use at the navy yard at Mare Island, in the other a machine to cancel stamps in use by a postmaster) was the property of the United States, regardless of the patent. That, therefore, the effect of the proposed decree being to extinguish the right of the government to the use of its property for lawful purposes, the suit was in substance against the United States.

Now, if this bill alleged that the United States had acquired by an improper expenditure of $40,000,000 of public money a lot of second hand shovels and rusty crowbars, that the shovels and crowbars had come into the possession of the Secretary of War, and he was about to use them in the legitimate business of the government, as in building a fort or a post-office, and praying that he be enjoined, then *Belknap* v. *Schild* and *International Supply Co.* v. *Bruce* would be in point. But that is not this case. If it should appear that any part of the debris that has been left by the escaping wrecked Canal Company can be put by the United States to any useful lawful purpose, there is nothing in this bill that seeks to prevent it.

No doubt if the United States were an ordinary party subject to suit it would have an interest in the question whether this property was or was not to be "improved" out of the treasury and would be a proper party defendant. But that was equally true from the beginning.

The money in the treasury is also the property of the United States, as the money in any state treasury is the property of the state; and the state or nation, as the case may be, has an interest in the question whether it should or should not be paid out for any purpose. They would be necessary parties in any such suit as this if it was possible to make them parties. In like cases, attempting to prevent the misuse of the funds of private corporations, such corporations are always required to be made parties. But the impossibility of making these political corporations party, as already pointed out, has been held to do away with that necessity. This objection, if good, would prevent all such litigation against state or federal officers, and would have been just as available, under the facts existing when the suit was brought as now. The rights of the defendant are in no degree added to, or those of the complainant diminished, by the hot impatience of the defendant in removing great sums from the treasury and turning them over to its hungry and clamorous besiegers since the suit was brought, and before an adjudication of the question whether he had or had not a lawful right to make such payments could be had.

The government has, of course, the right to "improve its property," but the Secretary of the Treasury has not an unlimited discretion to use the public money in expenditures on public property. For example, the United States owns real property in Chicago, on which a post-office and custom house are being built. It would hardly

be contended, however, that the Secretary of the Treasury, or Congress, for that matter, could lawfully apply the public funds to the "improvement" of that property by building and operating a hotel there. There is a limit to the right to "improve" government property. The idea seems to be in substance that public money cannot be unlawfully spent on public ground.

A railroad company may own ground and money, but it does not follow it may use the corporate funds to build and operate a theater on that ground. A private person may "improve" his property with his own money as he pleases. A corporation of limited powers may only improve or use its land or money for purposes within the corporate powers.

The suit is in no sense a suit against the United States.

The United States is not a party to the record; hence, except in a very few cases, not to be considered a party to the suit.

Osborn v. *Bk. of U. S.*, 9 Wheaton.
Davis v. *Gray*, 16 Wall., 220.
United States v. *Lee*, 106 U. S., 196.

Nor is the suit one in which a decree is sought against an officer of the United States which, by requiring him to pay out money, is in substance a decree for the specific performance of its contracts—the class of cases in which the state or the United States is held to be in substance a party, though not party to the record.

Pennoyer v. *McConnaugh*, 140 U. S., 1.
Louisiana v. *Jumel*, 107 U. S., 720.

Nor is it a case in which a decree is sought to prevent the officials of the United States from using the property of the United States for lawful government pur-

poses, as in *Belknap* v. *Schild*, 161 U. S., 17, and *International Supply Co.* v. *Bruce*, 194 U. S., 601.

Nor is it a case where the United States is an indispensable party, as in *Cunningham* v. *M. & B. R. R. Co.*, 109 U. S., 446. The remarks of the court in *Tindal* v. *Wesley*, 167 U. S., 221, distinguishing that case, are in point here:

> "Nor is it one like *Cunningham* v. *Macon & Brunswick Railroad*, above cited, in which the plaintiff seeks to enforce a lien upon real eseate in the actual possesion of and claimed by the state, where a decree of sale would be fruitless, as no title could be given to the purchaser without the presence of the state as a party to the proceeding."
>
> *Tindal* v. *Wesley*, 167 U. S., 221.

There is no difficulty about rendering an effective decree in this case against the officer.

III.

The only remaining question on this subject is the nature of the act sought to be controlled.

There is no difficulty here.

The distinction here is that, as to matters committed by the law to the discretion or judgment of executive officials, that discretion cannot be controlled. As to matters that are not committed to their discretion or judgment, but a certain thing is commanded or forbidden, they must obey. When they act in mere political matters, they act, and by the law are authorized to act, upon their opinion or judgment. For example, the President is required, on application by the legislature of a state when in session, and of the Governor when not in ses-

sion, to suppress domestic insurrection in the state. In *Luther* v. *Borden*, 7th Howard, 1, the court held that this left it to the President to determine who was the Governor and what body of men composed the legislature; that he was authorized to form and act on his own opinion, as to these political matters, and his decision was not open to review by the courts. So when a bill was filed by a state to enjoin the Secretary of War from enforcing the reconstruction legislation, the court held that in these political things the Secretary of War was independent of the courts.

Georgia v. *Stanton*, 6th Wallace, 50.
Mississippi v. *Johnston*, 4th Wallace, 475.

These cases are good illustrations of the kind of matters with which the courts may not interfere. If the President merely abuses his power and discretion as commander in chief of the army and navy, his responsibility is elsewhere.

But the thing sought to be prevented here is exactly of the kind that has been constantly controlled, namely, an unlawful expenditure of the public money, and issue of public bonds not in exercising administrative discretion, and not in government at all, but in an unauthorized business venture. A case involving that question is one of private right, as to which the courts should and do give judgment, and not a political one, upon which they do not pass.

Crampton v. *Zabriskie*, 101 U. S., 601.
Dillon on Mun. Corp., Secs. 914-924.
Rippe v. *Becker*, 56 Minn., 100.
Burke v. *Snively*, 208 Ill., 328.

One form of relief has been uniformly denied, and that is the special relief asked for in a great majority of the cases, where the prayer has been denied, and is discussed under another head. The court will not issue an order requiring money to be paid from the treasury to a mere creditor, in the absence of a specific appropriation. That relief was asked in *Kendall* v. *United States, ex rel. Stokes, supra,* but refused, the writ as issued only requiring credit to be given the relator, but omitting the order that the amount found due should be paid. The same order was the relief, and the only relief prayed in *Decatur* v. *Paulding*, 14th Peters, 407; in *Brashear* v. *Mason*, 6th How., 92; in *Guthrie* v. *United States*, 17th Howard, 284; in *Resside* v. *Walker*, 11 Howard, 272.

Louisiana v. *Jumel*, 107 U. S., 720.

The propriety of this course would not seem open to question, and the cases illustrate what an interference with executive discretion is, and what a suit in substance, though not in name, against the United States is. To allow a public creditor to force money out of the treasury by the process of the court, addressed to the custodian of the public funds, is the exact equivalent of allowing the government to be sued and its money attached and scattered. That is the decree for the specific performance of contracts which is held to be a suit against a state and not allowed.

Pennoyer v. *McConnaugh*, 140 U. S., 1.
Louisiana v. *Jumel*, 107 U. S., 720.

It cannot be said to be the positive legal duty of the Secretary of the Treasury to pay money out of the treasury, in the absence of a specific appropriation, but it is his positive legal duty not to pay the money out without an appropriation made by law.

It is clearly within the discretion of Congress and the President to determine to which of several different lawful purposes the public money shall be applied. If, for example, when the President and Congress were of opinion that the money in the treasury should be used for purchasing military supplies, any person could apply to the court and, by proving a case, procure an order, the court would feel obliged to make, directing the Secretary of the Treasury to divert the money to other uses, it is plain the legitimate authority of the political departments is obstructed.

An injunction to prevent the dissipation of the public funds to unlawful purposes interferes with nothing except what ought to be interfered with.

The rule in these matters is not a peculiarity of the law governing cabinet officers. The only question peculiar to them is whether they can be sued at all or not. That being settled, the rest is a rule of universal application. Whenever public or private agents are authorized to use and act upon their discretion or judgment, the court cannot substitute its own discretion for that of the person or persons in whom the law or the persons entitled have placed it. But when such persons step outside the limits of their discretion and attempt to do or refuse to do things they are not authorized to do, or not to do as they think best, the courts interfere.

It is sometimes said that officials will not be controlled in matters where they are required to use judgment or discretion. That, however, only means, when the law authorizes them to act upon their own opinion, or at their discretion. Some confusion has arisen from this source in some discussions. The fact that Cabinet officers may be obliged to use intelligence in ascertaining what

their legal duty in any given case is is not important. The question in every case is, not whether the law is hard or easy to read, but what it is when it is read. To ascertain the law applicable to any state of facts that may come before any of the departments is not a mechanical process. The question is not how much effort or skill is required to learn the law, but does the law, when known, command or forbid the doing of the thing complained of, or does it leave it to the opinion, judgment or discretion of the officer whether the thing shall or shall not be done.

In every case in which mandamus or injunction has issued "judgment" of executive officials of this character has been overruled.

But it is not a matter of discretion with the Secretary of the Treasury whether he will or will not withdraw money from the treasury without an appropriation made by law, or whether he will or will not borrow money on the credit of the United States without lawful authority.

> "No money shall be drawn from the treasury but in consequence of appropriations made by law."
>
> Constitution, Sec. 9, Sub. 7.

That is mandatory, not advisory.

The principle that covers the whole matter is that everybody, high and low, must obey the law. When the law provides that an agent, public or private, shall or shall not do anything, as he thinks best, then he obeys the law whether he does or does not do that thing. But when the law commands or forbids anything, then he must do it if the law so commands, or must not do it if the law forbids. The law must always be obeyed. This

question involves the whole merits of the case. If the proposed payments and bond issues complained of are authorized by the law, the discretion of the Secretary of the Treasury to make or not make the payments, or to issue or not issue the bonds, cannot be interfered with. But if they are unauthorized by the law, they can and should be prevented.

It would be a material addition to the cost to the United States of this greatest of south sea speculations if, beside the unmeasured outlay of treasure and the overturning of constitutional principles involved, it should also be necessary to establish the doctrine that the United States treasury is the only public treasury in the United States that can not be protected against willful plunder or more dangerous, well intentioned, enthusiastic precipitous, lawless waste by what is everywhere conceded to be the most effective means yet discovered, viz.: the right of individual citizens to insist, and insist effectively, that "no money shall be drawn from the treasury but in consequence of appropriations made by law."

I.

The act does not purport to authorize any payments or bond issues, under existing circumstances.

If money is drawn from the treasury of the United States to make the payments alleged by the bill to be about to be made, will it be so drawn in consequence of appropriations made by law, or if the contemplated bond issues are carried out will it be under lawful authority?

This resolves itself into two parts:

1st. Is there an act of Congress which, properly con-

strued, contains directions that under existing conditions the money shall be drawn from the treasury for that purpose, or that the bonds shall be issued as proposed?

2nd. If any act of Congress does contain such directions, is that statute authorized by the constitution?

At the time the suit was brought the only legislation on the subject was the act of Congress approved June 28, 1902.

Statutes at Large, Supp. 1903-4, p. 429.

Since then an act was passed, approved April 30, 1904, to provide for the government of the Canal Zone, and including a clause intended to appropriate $10,000,000 to pay the sum agreed to be paid to Panama in the treaty. These two acts are the entire legislation on the subject. This latter act purports to make provision for a payment of $10,000,000 to Panama, but does not touch the $40,000,000 for the New Panama Canal Company property, nor the subsequent expenditures, the legality of which must be determined entirely by the Act of June 28, 1902.

For these latter payments and bond issues there is no color of authority except the Act of June 28, 1902. And even if the sum to be paid to Panama had been otherwise provided for, or even if the ten and forty millions had been in fact paid since the commencement of this suit to Panama and the Canal Company, it would still be necessary to examine the provisions of the Act of June 28, 1902, as to those payments, and ascertain whether, if made, they were lawfully made, and whether the things required to be acquired for and on behalf of the United States had been so acquired, in order to ascertain the lawfulness of the subsequent payments and bond issues, which in view of facts occurring since the bill was filed, is the question of present importance.

That act, approved June 28, 1902, contains no absolute directions to pay or appropriation of money, but only an appropriation subject to two conditions precedent.

The provision is: "That when (1st) the President shall have arranged to secure a satisfactory title to the property of the New Panama Canal Company, as provided in Section One hereof, and (2nd) shall have obtained by treaty, control of the necessary territory, from the Republic of Colombia, as provided in Section 2 hereof," he is authorized to pay for the property of the New Panama Canal Company forty millions of dollars, and to the Republic of Colombia, such sum as shall have been agreed upon.

"And a sum sufficient for both said purposes is hereby appropriated out of any money in the treasury not otherwise appropriated, to be paid on warrant or warrants drawn by the President."

The further sections provide that then, *i. e.*, after these conditions have been complied with, the President shall, through the Isthmian Canal Commission, cause to be excavated a canal, etc., and a further sum of ten million dollars is appropriated towards the project.

The act is, of course, an entirety, the several parts are mutually dependent; no part of the things authorized to be acquired would be useful without all the others. The United States would have no use for the property of the Canal Company without the concessions provided to be acquired from the Republic of Colombia, nor for any of the things, unless all can be had.

Hence, if the transaction as to those rights is not complete, it follows there is no appropriation of any sum for any purpose. It is only when both have been acquired

in the way provided by the act that authority is given to pay for anything.

The fact that something else or even the same thing may have been secured from the Republic of Panama, and that provision may have been attempted to be made in subsequent legislation for the payment to the Republic of Panama of the purchase price for that something else, in no way affects the question.

It is submitted there is no authority given by this act for the payment of any sum under any circumstances to the Republic of Panama, nor to any one under existing conditions.

That the treaty with Panama is not a performance of this condition, because

1st. Whatever has been acquired has not been acquired in the way required by the statute, *i. e.*, not by treaty from Colombia.

2nd. The things required to be acquired by treaty from Colombia have not been acquired at all, either from Colombia or Panama.

I.

It is not a compliance, because what was acquired was not acquired by treaty from Colombia.

The language is express, that when the President shall have obtained, * * * *"By treaty from the Republic of Colombia*, as provided in Section 2, he is authorized to pay *to the Republic of Colombia.*" This language is plain. It, in terms, requires the property and rights described to be obtained by treaty from the Republic of Colombia; and in that event, the other conditions being

met, purports to authorize a payment to the Republic of Colombia.

It is not a compliance with the terms used, that these rights and privileges shall have been obtained by force from the Republic of Colombia, or by treaty or otherwise from any one else; nor does this act in terms authorize under any conditions the payment of any money to the Republic of Panama. The only act which does, it is maintained is void for reasons to be indicated later.

It will not be denied that if the act is to be read literally this point is well taken.

It is, of course, admitted that in the construction of statutes and of written instruments generally, the literal meaning of words may be departed from, when a different meaning is unmistakably manifest from the entire context; but this rule must be sparingly applied. Except in very exceptional cases, law-makers must be taken to mean just what they say.

It might, for argument's sake, be conceded that where an instrument provides that property shall be acquired from the owner (naming him), and it is afterwards discovered that another was the owner, the real object aimed at was the acquisition of the property; and if a good title to the property should be obtained from any other source, the provision might be held to have been complied with. But, even this is a departure from the language used; and it must clearly appear that there was no possible reason why the personality of the grantor could affect the wishes or intentions of the person or assembly using the language. If, however, it should appear that there were personal relations between those employing this language and the persons named, from which it might in any way be inferred that those using the lan-

guage were or may have been to any extent influenced by that personality, then the intent, when saying one thing to mean another, cannot be inferred.

Now, there were in this case very especial reasons why Congress would be willing to acquire the things described in Section 2 by treaty from the Republic of Colombia, and pay the money to the Republic of Colombia, and be unwilling to acquire the same property from any one else, even though that other might be able to deliver a title good under the law of nations.

A treaty was in existence between the United States and the Republic of Colombia, by the terms of which the United States guaranteed the sovereignty of the Republic of Colombia over this territory. It is true there was and had been for a long time, a difference of opinion between the representatives of the Republic of Colombia and the State Department of the United States as to the construction of that treaty; whether it did or did not impose the obligation upon the United States, to make that guaranty good as against domestic enemies. But, be this as it may (and it may be conceded the court should follow the construction of the State Department, if material), it is evident that there is much about the personality of the person whose title we have guaranteed, which might make us willing to buy from that person, but not from another. It would plainly be undesirable to acquire a title which, though good on the face, we would be estopped to assert. Senators and representatives might very plausibly reason that to acquire a title, and to ourselves assert a title, however sound, yet hostile to the one the United States has guaranteed to protect, would involve a breach of the public faith, or that even if this charge could not in their judgment be sustained, might have been anxious

to avoid even the appearance of evil, and might have regarded the incurring of even an unjust suspicion against the public faith, as a serious harm to be studiously avoided; and, therefore, inserted the language which is sought to be discarded.

Further, the fact of a controversy is enough, no matter what the merits. Nothing is more common than to buy peace even when we think demands made are unjust. In a contest between private persons when one agrees to pay for a deed from his adversary, a deed from any one else that does not settle the controversy, no one would think of claiming as sufficient to charge him. The same rule applies here.

This view is greatly strengthened by comparing Section 1, providing for acquiring the property rights of the New Panama Canal Company, and Section 2, providing for acquiring the strip, etc., from Colombia. As to the property and rights described in Section 1, all that was or could be desired, was to acquire a good title. We were under no obligations to the Panama Canal Company, and we had no controversy with them to settle. The difference between the language employed is marked, showing Congress knew how to say it merely wanted a title, and how to say it wanted a title acquired in a specific way. As to the property of the New Panama Canal Company, "the President is hereby authorized to acquire for and on behalf of the United States, the property, * * * owned by the New Panama Canal Company, * * * provided a satisfactory title to all of said property can be obtained."

But, in Section 2, as to the rights, property, etc., therein described, the act proceeds in exactly the same language as Section 1 to a point, then the change introduced is

significant. "That the President is hereby authorized to acquire (*from the Republic of Colombia*) for and on behalf of the United States," *i. e.*, the language already used to indicate the purpose merely to acquire property derived from any source that could make a title, is adopted, and this additional language, *"from the Republic of Colombia,"* studiously inserted and the requirement as to the title studiously omitted.

The same distinction goes through the entire act.

> In Section 3 it is provided that, "when the President shall have arranged to secure a satisfactory title to the property of the New Panama Canal Company, * * * and shall have obtained *by treaty from the Republic of Colombia*, * * * *he is authorized to pay for the property of the New Panama Canal Company* forty million dollars, and *to the Republic of Colombia*, such sum, etc."

It can not be that under these conditions, the specific directions that the property and rights be acquired by treaty from the Republic of Colombia, is the equivalent of a direction to get the property honestly, if possible. Suppose the Isthmus had been taken from Colombia by force by a foreign nation against whom it would be conceded the United States was under treaty obligations to protect Colombia; or, suppose such a foreign nation had done what was done by the United States toward depriving Colombia of its title; and immediately thereafter was to appear as the owner, it would hardly be claimed that a transfer by such foreign nation would be in accordance with the terms of this act, or that the money appropriated to Colombia could be lawfully turned over to Colombia's despoiler. But, if the construction that these words in the act requiring the title to be acquired from the Republic of Colombia by

treaty are surplusage be adopted, which is the substance of the opposite contention, then such an acquirement of the title would comply with the terms of the act.

It is submitted, this condition precedent has not been complied with.

II.

But the treaty with Panama is not a compliance with the conditions precedent set out in the act, because the things required to be acquired from Colombia have not been acquired at all from Colombia or Panama.

The condition precedent that the President should acquire from the Republic of Colombia by treaty perpetual control of a strip of land not less than six miles wide, has not been complied with by the treaty with Panama, because:

The boundaries of the strip supposed to be conveyed by the treaty with Panama, are not defined in that treaty, nor are any means afforded by which they can be defined. The grant is, therefore, void for uncertainty.

The language employed to describe this "zone," is the following:

> "A zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal, of the width of ten miles, extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low water mark, and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low water mark."
>
> Act 2 of Treaty.

Now, if it further defined where the canal was to be constructed, a line would be furnished from which surveyors could locate the boundaries, but that is not done. The line of the Canal from which these measurements are to be made remains entirely indefinite, and can only be located by further agreement, in order words, by a new treaty. So far as the terms of the grant are concerned, they would be equally satisfied by a "zone" ten miles in width across the Isthmus along the southeastern border of Costa Rica, or along the northwestern boundary of Colombia, or crossing the Isthmus any place between these two.

This may be held to be narrowed somewhat by the other parts of the treaty. The grant describes the "zone" as "for the construction of said canal." The "said canal" is described in the preamble, only as "a ship canal across the Isthmus of Panama." This does not help any. But the remainder of Article II says, that "the Cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant." This narrows the choice somewhat. But these terms would be equally as well met by a "zone" extending across the Isthmus ten miles east of a line joining the western boundaries of the two cities, or ten miles west of a line joining the eastern boundaries of the two cities, or extending five miles on each side of a line connecting the center of the two cities, or, as it is by no means provided or expected that the line of the canal should be a straight line, the "zone" might be five miles on each side of any crooked line joining those cities, or any number of differently bounded strips would equally answer the only calls in the description, namely, ten miles wide, run-

ning across the Isthmus, and including the Cities of Panama and Colon.

Now, which of these strips can the Commission take possession of? Where can they locate their courts? What will be the extent of their territorial jurisdiction? Where will their writs run? In what ports must ships pay duties to the United States and in what to Panama? When can goods admitted to the "zone" be stopped as crossing to the territory outside the "zone" without paying duties? What persons must obey the general law of Panama; and what persons must obey the special laws of the United States or of the Commission?

A deed, describing property in such terms, equally applicable to two or more pieces of property, carries a patent ambiguity, and even when affecting only property rights, is absolutely void for uncertainty.

Boardman v. *Reed*, 6 Peters, 345.
Deery v. *Crary*, 10 Wallace, 269.
United States v. *King*, 3 Howard, 773.
Shackleford v. *Bailey*, 35 Ill., 387.
Hill v. *Utt*, 6 Gray, Mass., 551.

But the case is much stronger when, as here, the grant is by the public; and includes, if valid, not merely property rights, but portions of the law making power of the grantor, an independent nation. In the case of grants of property between individuals, courts in construing the language of conveyances construe the language, if doubtful, with the presumption against the grantor.

Douglass v. *Lewis*, 131 U. S., 75.

In the case of grants by the public, especially carrying such power, this presumption is reversed, and all intendments are against the grantee. Everything not

clearly shown to have been granted is held not to be granted.

Charles River Bridge v. *Warren Bridge,* 11 Peters, 544.

Covington, etc., Turnpike Co. v. *Sandford,* 164 U. S., 538.

"A bargain between a company of adventures and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases is now fully established to be this: That any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public."

Providence Bank v. *Billings,* 4 Peters, 514.

The bank claimed exemption from taxes; the charter was silent on the subject.

"As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear. * * * It may, perhaps, be said, that in the case of the Providence Bank, this court was speaking of the taxing power, which is of vital importance to the operation of every government; but the object and end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created."

Charles River Bridge v. *Warren Bridge,* 11 Peters, 420, pp. 544, 545 and 547.

"It is settled law that in grants by the public, nothing passes merely by implication, and if a contract with a state relating to the exercise of franchises is susceptible of two meanings, the one restricting and the other extending the powers of a corporation,

that construction is to be adopted which works the least harm to the state."

Covington, etc., Turnpike Co. v. *Sandford*, 164 U. S., 588.

It must always be remembered that in this case "the public" is Panama, and the subordinate seeker after public favor "the company of adventurers," is the United States.

This question would arise very promptly, even if at the start, the Commission were allowed to take possession of any strip it might select.

Now, Congress decided that it was not safe to go into this expensive enterprise, and rely, as other "adventurers" under like circumstances, on the laws of the country in whose territory the work is done, for police protection and sanitary regulations; but required as a condition, that power to make police and sanitary regulations for this strip, and establish judicial tribunals, to enforce them, should be secured. The treaty also purports to grant these and more such powers in the widest possible terms. Now, suppose a code of laws established for the "zone," defining offenses and providing for their punishment. A man anywhere, even in the very center of the work, does the things that are forbidden. What can be done with him, even suppose the law to be valid otherwise? It would plainly be impossible to show that the place where the wrong was done was in the "zone." Is there any doubt what would have to be done with him, if he ever got to a place where the writ of *habeas corpus* was known and respected? Or, suppose, in the exercise of this delegated authority to make laws, Congress or the Commission should adopt a civil code for the "zone," establishing a given scheme for the inheritance of property, dif-

ferent from that of Panama. A man dies anywhere on the Isthmus. How would his property be distributed? Suppose Congress, or the Commission, levies taxes on the [illegible]; who must pay them, and what property may be seized for non-payment? There would seem to be but one possible answer. In order that the particular individual should be held exempt from the laws of his own country, and liable to those of a stranger claiming under such a grant as this, the burden of proof is on the stranger to show the grant which certainly covers the particular territory over which authority is claimed. That plainly cannot be done.

Questions similar to this have arisen as to municipal corporations, and in every instance it has been held, that unless the boundaries are clearly established, no person is subject to their laws. "Corporations have boundaries, or they have no existence."

City of Little Rock v. *Parish County Clerk*, 36 Ark., 172.

An effort was made to incorporate the Town of Enterprise, Florida. The proceedings were held invalid, because the boundaries could not be identified. The court says:

> "Under our statute, and in the very nature of municipal government, it is essential that it should have ascertained and well defined boundaries. The organization of a municipal government under our general law for incorporating towns and cities, without defined metes, is unauthorized and would be a nullity.
>
> *Gray* v. *Sheldon*, 8 Vt., 403.
>
> *Pierce* v. *Carpenter*, 10 Vt., 480.
>
> Dillon's Municipal Corporations, Sec. 482."

"Other objections are urged to the validity of this incorporation, but it is not necessary to consider them, as we think it was illegal and void on account of uncertainty in the proposed corporate limits."

Town of Enterprise v. *The State ex rel.*, 29 Fla., 128, 141.

An action was brought to recover a penalty for resisting plaintiff in driving defendant's cow to pound and rescuing her. The plaintiff claimed right to seize the cow as an officer of the town where the matter took place. The action was held not sustainable, because the boundaries of the town were inaccurately defined in its charter.

The court said:

"Much liberality has been indulged in relation to description in deeds, but even there it has been considered necessary to have so much of description as that a surveyor could, with persons to identify landmarks and localities, survey out the tract. * * * *And the security of the community against penalties and forfeitures imperiously demands this.*

This is not setting out limits and bounds, as the statute and public safety requires.

And if it was not binding on all persons, it was not binding upon defendant."

Cutting v. *Stone*, 7 Vt., 471.

To the same effect:

Plantation No. 9 v. *Bean*, 40 Me., 218.

Howell v. *Kinney* 99 Ga., 544.

Dillon on Municipal Corporations, Sec. 483.

State ex rel. v. *Pocatello*, 3 Idaho, 174.

The situation would, of course, be in no degree relieved by the Commission causing surveys to be made and reaching a conclusion as to the route that might for the present be deemed desirable to construct the canal over.

The President and the Commission might change their minds. Further investigation might show a much more available route one ten or twenty miles east or west of the line first selected. Then new measurements would have to be made. The whole scene would be shifted; what had been "zone" would now not be "zone." The persons and territory which had been subject to American laws would cease to be subject to those laws. The United States would cease to have the rights described in the treaty, in territory where they had formerly had those rights; and territory which had not been subject to American laws, and in which the United States had not had rights, would become subject to those laws; and in that territory the United States would have the rights it had not had before, and a like shifting of the rights and authority of Panama would occur.

Further, the property holdings of the United States would shift in the same manner.

The statute requires distinctly that *all* property of the New Panama Canal Company shall be acquired for and on behalf of the United States.

But, with a cheerful unconcern about the requirements of the law quite characteristic of the entire proceedings in this matter, it is proposed to pay for part what the law only professes to allow to be paid for all, just as when the statute requires as a condition to any payments that the perpetual control of an entire strip not less than six miles wide across the Isthmus shall be acquired, the payments are proposed to be made for a part of a strip, leaving out the most important territory in the strip and the only territory known to be in the strip, the cities of Panama and Colon.

Article VIII of the treaty provides:

> "The public lands situated outside the zone, described in Article II of this treaty, now included in the concessions to both their enterprises, and not required in the construction or operation of the canal, shall revert to the Republic of Panama, except any property now owned by or in the possession of said company within Panama or Colon or the ports or terminals thereof."

Now, who can make an inventory of the property of the United States at the Isthmus? But, as these boundaries vary, the property which had been ours would revert to Panama. Whether property that had once reverted to Panama would become ours again would probably be disputed.

It is plain such a shifting potential proprietorship of the entire Isthmus was not contemplated by either the statute or the treaty, nor was it contemplated that the first tentative line laid out by an engineer should be final. It is entirely clear that what the statute contemplated was that the perpetual control of a definite strip of ground not less than six miles wide should be first secured, and that the canal should be constructed anywhere in that strip as might from time to time be thought best; that we were to have the perpetual control of a strip of ground six miles wide, and in that strip do as we pleased. The location is impossible, because the canal must first be constructed, not laid out, before the strip can be located, and the strip has to be located before either under the treaty or the statute its construction can be lawfully commenced. It is not provided that the line of the canal may be located anywhere in Panama, as chosen by the President of the United States or by the President of Panama, or even as may be agreed by both. When a line is to be located from which these measure-

ments can be made, it can plainly only be done by the agreement of both Panama and the United States, that is, by a treaty. But the constitution has not given to surveyors or commissioners, but to the President and the Senate, the power to make treaties on behalf of the United States, and as yet it has not been claimed that that particular power can be delegated.

The only statute purporting to authorize the payment of any money or the issue of any bonds requires that the necessary rights shall be secured by treaty from Colombia before they are paid for; and the right to the ground secured before any money is spent in its improvement; not that these things shall be first paid for, and these costly improvements first made, and then depend on the generosity or conscience of whatever disinterested patriots from Paris or New York might, at the time we needed these things, happen to be in control of the local government at Panama.

With the first effort to enforce a law made for this imaginary strip by Congress or by the President, or Commission, or any one to whom Congress might attempt to redelegate this delegated authority against any one resisting it, who will bring a suit for false imprisonment or apply for a writ of *habeas corpus* in a lawful court, or in any proper form test the matter, the whole scheme would fall to pieces. There is no "zone." It would have to be defined by further treaty, and a new grant had, which could no doubt be secured for a consideration. Or, judging by the liberal way in which our government has been dealt with in its efforts to give to the people there multiplied values to everything they own, perhaps for nothing, though I am skeptical as to that. But that is not important

here. The only statute making an appropriation for this purpose requires that these rights over an ascertained strip of ground shall be secured by treaty from Colombia before or at least at the same time the money is paid.

III.

This condition precedent has, further, not been complied with, because the President has not acquired, for and on behalf of the United States the perpetual control of a strip of land six miles wide, *including jurisdiction to make police and sanitary laws, and establish judicial tribunals to enforce them.*

All appropriations and authority to issue bonds are expressly conditioned on this legal result being accomplished.

It is not sufficient that a treaty be negotiated in the language of the act, but the legal result of conferring upon the United States the perpetual right to make laws for that territory must be brought about.

The treaty with Panama does not accomplish that result. The only treaty that will or can accomplish that result, and that is manifestly not contemplated by the act, is one of absolute cession to the United States of the territory to be affected, including, not excluding, Panama and Colon, when such laws can be classed as needful rules and regulations respecting the territory of the United States, which Congress has power derived from the constitution, its only legitimate source of authority, to make.

The attempted grant of power does not accomplish the legal result of vesting in the United States perpetual jurisdiction to make laws for this territory, because:

(a) The grant, if valid for any purpose, is temporary, not permanent, extending only during the pleasure of the Legislature of Panama.

(b) The grant is invalid, because (1st) the treaty-making power of Panama does and can include no constitutional power to give, or, rather, sell, such authority to a stranger. (2nd) The United States has no constitutional power to accept such a grant, or exercise such authority.

A.

The grant, if valid, is temporary, not permanent, extending only during the pleasure of the Legislature of Panama.

Even if treaties, according to the laws of Panama, are, as here, the supreme law of the land, such laws may be repealed at the pleasure of the legislature.

The Cherokee Tobacco, 4 Wall., 616.
Whitney v. *Robinson*, 120 U. S., 194.

True the twenty-fourth article of the treaty says this shall not be done. But a provision in a law that it shall not be repealed, or that any future change in the law shall not affect the law, is too plainly void to be considered. This clause, like any other, can be repealed.

If that were done, our power would be at an end. Nothing would be left except the right to negotiate further and buy again what he had already paid for. The United States would, even if this Article III of the treaty were repealed a month after the money was paid, have all it could claim under that article. This article, if of any validity, is a law relating to the internal domestic police

of Panama; and even if expressed in terms that would show the purpose to make it permanent, could only be temporary. No Congress or law-making power can bind its successor in its exercise of such authority.

But the article is not framed in terms that indicate any purpose to attempt to establish this article as the law for any longer period than the constitutional one expiring with the time at which the judgment of the legislature is formed that its further continuance is not advisable.

Ordinarily legislative power cannot be delegated, but something very like it is done when local municipal corporations, cities and counties are invested with power to make local laws. This is sustained as giving to the people of a locality the right of local self-government, but it is uniformly held that such grants of power over a portion of the territory of a state must be construed as not conferring any vested right to its continuance, but as conferring such powers only during the pleasure of the legislature, and subject to be changed or entirely taken away at any time. And the fact that these municipalities may have invested moneys, or otherwise given valuable considerations on the faith of the perpetuity of these institutions, does not change the matter, saving of course property rights.

People v. *Burr*, 13 Cal., 343.

Churchill v. *Hacker*, 68 Georgia, 181.

N. O., etc., Co. v. *City of New Orleans*, 26 La. Ann., 478.

Prince v. *Crocker*, 166 Mass., 347.

The rule, of course, is different as to property rights; they may be granted in perpetuity.

Before, then, the legislature, in enacting a statute, or the treaty-making power in creating a law under its law-making power, can be held to have attempted to do or to have promised the unlawful thing of perpetually binding their respective successors not to exercise their lawful powers in perpetuity, that meaning must affirmatively appear in the clearest terms.

Charles River v. *Warren Bridge,* 11 Peters, 544.

The third article purports to grant the powers therein described to the United States, but does not mention the term during which they shall be retained and exercised. This, of course, leaves the presumption above shown, as to the duration of the grant, intact.

But a further examination of the text makes this plainer, if that were possible. There are six distinct grants from Panama to the United States in this treaty, five of property rights, one of law making power. Each of these five is expressly stated to be "in perpetuity," but as to this grant of law making power alone, these words "in perpetuity" are omitted; the language is the same in every case, with this exception.

> "First. The Republic of Panama grants to the United States *in perpetuity,* the use, etc., of a zone, etc.
>
> "Second. The Republic of Panama further grants to the United States, *in perpetuity,* the use, etc., of other lands.
>
> "Third. The Republic of Panama further grants in like manner to the United States, *in perpetuity,* all islands, etc.
>
> "Fourth. The Republic of Panama grants to the United States .....
> all the right, power and authority, etc.
>
> "Fifth. The Republic of Panama grants, *in per-*

petuity, to the United States, the right to use the rivers, etc.

"Sixth. The Republic of Panama grants to the United States, *in perpetuity*, a monopoly for the construction, etc."

This marked difference was not accidental.

If, after the money is paid, the Legislature of Panama should take an example from some legislative assemblies in the United States and enact measures or introduce and debate bills designed to reasonably regulate the canal business; to provide for the safety of persons and property being transported on canals; to regulate the rate of speed at which vessels might travel on canals, to regulate the charges to be made for such service; to devise ways and means to suppress monopolies in the canal and railroad business; to punish restraints of trade, reasonable or unreasonable; to provide for inspection of canals and railroads by local officials, fees to be paid by the canal or railroad company; to enter into negotiations with foreign nations who might have occasion to secure privileges of transit by railroads and canals across the territory of Panama, no lawful cause of complaint could be found. This grant, then, even if valid, can only be construed as a grant of the authority therein described to be held during the pleasure of the legislature, because, first, the presumption is, that all grants of such power, being intended for the better government of the people of the district affected, are only intended to be temporary, and require clear affirmative language to show a different intention. (*Charles River Bridge* v. *Warren Bridge*, 11 Pet., 544.) The position that it was intended by the law-making power to attempt to do the unlawful thing of binding its successor not to exercise

its lawful power for the public advantage, must be plainly stated, as, for example, in the act of Congress herein considered, where an attempt is made to fix the limit of appropriations by future Congresses, or it cannot be inferred.

Second. The intention that it shall not be permanent is affirmatively shown by the use of express language defining the term of all the other grants as "*in perpetuity*," and omitting this language in this grant.

Third. Even if the intention to provide against the resumption of this grant of power had been expressed, it would have been void as an attempt by the law-making power to bind its successors.

I hold it to be a principle of universal application of which the courts of the United States will take judicial notice:

That it is beyond the power of any government or of any people, no matter what the form of government may be, by treaty or otherwise to permanently part with the right to make laws for their own government and bind those who are to come after them.

That even as to laws that might be valid till repealed or changed, a provision that they should not be changed is outside the limits of that power. No matter what form of government they may establish or what powers their constitutions may purport to confer upon any agency, these constitutions may be lawfully changed, and no matter how plainly it may be stated that the present law shall last forever or that the agencies now established shall have power to make irrepealable laws or to grant by treaty or otherwise to any one else the permanent power to make laws for them.

Any such attempted making of irrepealable laws, or any such irrevocable grant to any agent, foreign or domestic, is *ultra vires* of the people themselves.

Stone v. *Mississippi*, 101 U. S., 814.

If the sovereignty is granted, a change which consists in setting aside that sovereignty would, of course, be revolution.

But when the sovereignty is not granted any such change is perfectly lawful and every court, certainly every court in the United States must take judicial notice of that rule. So even if it were competent for Panama through its treaty-making agents or otherwise to establish Art. III of this treaty as the law of Panama for the time being; it is always competent for the people to change that as any other law, and resume the exercise of their *inalienable* right to make such laws for their own government as they may deem will promote their welfare.

That any one, certainly the United States, dealing with any agent of Panama acting under never so plain a paper authority, is a purchaser with notice and must take any such grant, however broad its terms, subject to the limitation that even if valid for any purpose it is and can be only temporary and may at any time be changed and lawfully changed and when so changed would be no longer the law in Panama.

But the condition precedent has further not been complied with because—

B.

The grant is invalid because:

1st. The treaty-making power of Panama does and can include no constitutional power to give or sell such authority to a stranger. It is entirely elementary that legislative power cannot be delegated. *Stone* v. *Mississippi*, 101 U. S., 814.

This case is entitled to special attention, not because the principle is in any degree doubtful, but because its exact facts are certain to be duplicated in Panama. It is well known that the people in that part of the world look upon lotteries in an entirely different light from that in which they are regarded in the United States. An entirely different policy on that subject will be certain to prevail in any territory governed by the Panama government from the one the United States would insist on. It was the police power, as applicable to that particular subject, that was under discussion in *Stone* v. *Mississippi*, and which the Supreme Court held could not even for a short time be sold or given away by the legislature, the servants of the people, *or even by the people themselves*.

The legislature of Mississippi chartered a lottery company for twenty-five years; the lottery company paying into the state treasury five thousand dollars for the use of the university; also an annual tax of a thousand dollars and one-half of one per cent. of its receipts. A subsequent statute forbade lotteries. The lottery company insisted on its right to continue by reason of this contract. The Supreme Court said:

> "If the legislature that granted this charter had the power to bind the people of the state and all succeeding legislatures to allow the corporation to con-

tinue its corporate business during the whole time of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object.

* * * * *

"All agree that the legislature cannot bargain away its police power in a state. Irrevocable grants of property and franchises may be made, if they do not impair the supreme authority to make laws for the right government of the state. But no legislature can control the power of its successors to make such laws as they may deem proper in matters of police." *Metropolitan Board of Excise* v. *Burne,* 34 N. Y., 657; *Boyd* v. *Alabama,* 94 U. S., 645.

* * * * *

"No legislature can bargain away the public health or the public morals. *The people themselves cannot do it, much less their servants.* The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." *Beer Co.* v. *Mass.,* 97 U. S., 25.

* * * * *

"But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people in their sovereign capacity have established these agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion if within the scope of their general authority while in power. But they cannot give away or sell the discretion of those that are to come after them with respect to matters the government of which from the very nature of things must vary with varying circumstances."

Suppose the work commenced and in progress. The "zone," if it could be found, full of improvident men in receipt of good wages. A more inviting field for the lottery man could not be imagined. He applies to the legislature of Panama for a concession to run the lottery; he reasons with the legislature, using convincing argument; the legislature becomes convinced that the public good requires the concession to be granted. He sells his tickets through the "zone." It would certainly be hard for an American court, with this case cited, to do anything with him.

It can not be said that this question only concerns the lottery man and can be decided when he is on trial. It also concerns the United States. The right to make payments or bond issues is conditioned upon securing the right to control such persons. The question, consequently, arises here.

The only even apparent exception to this universal rule that legislative power can not be delegated is the case of subordinate local municipal or quasi-public corporations. As to them it has been held that they may be given the power of local self-government.

> "It is a cardinal principle of our government that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence while the rule is also fundamental that the power to mke laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench on that rule." *Stoutenberg* v. *Hennick*, 129 U. S., 141, 147.

This is the limit. There is no instance until this treaty, of even an attempt to establish local municipalities and give or sell the power to make laws for them to strangers. These limitations are not peculiarities of our own local law, do not arise out of any express limitations

in the federal or any state constitution, but arise out of the general principles of regublican government applicable everywhere where republican institutions are established. This is the case even when the right to exercise legislative power over any portion of the people or territory is attempted to be sold by an act of the state legislature with its full power, much less can it be defended when attempted to be made by the other law-making authority, the treaty-making power, an agent of limited power of a limited government. In a republic there is no such thing as unlimited power. The treaty-making power is not absolute; certainly no higher than that of the people themselves, which the Supreme Court in *Stone* v. *Mississippi* held not sufficient for that purpose. There is such a thing as an unconstitutional treaty, a treaty, for example, providing that a citizen should be put to death without trial, would be void as a bill of attainder; but this power is not only subject to the express prohibitions in the constitution of the country in whose behalf it is made, but it is also limited by the nature of things. This power has been held to be given by the Constitution to the President and Senate, as broadly as in any country; hence the limitations here can be taken as applicable everywhere. It is certain the United States could and would enforce against Panama no rights it could be shown they would not allow under similar circumstances to be enforced against themselves; to the contrary, the superlatively sensitive conscience of the United States always insists in our dealings with these weaker countries that we shall take the worst of every bargain we make with them, and give them the benefit of every reasonable and unreasonable doubt.

This does not mean merely that in the exercise of polit-

ical power the political departments of our government should act justly, but the rule applies to the courts.

Any provision of a treaty which the courts of the United States would refuse to recognize as the law and enforce as the law in the United States because in excess of the treaty-making power, would not be the law in Panama, and the courts in the United States in any case where the question involved was, What is the law in Panama? would not recognize such an *ultra vires* provision as the law in Panama. Not only does the court judicially know this but in the present case the averment of the bill which as the law of a foreign country is matter of fact and admitted by the demurrer is:

> "That the legal effect in the territory of the Republic of Panama of this or any treaty executed by the said representatives of Panama is the same as the legal effect in the territory of the United States of a treaty in like terms made on behalf of the United States by the President and Senate." (Rec., p. . .)

When the defect is merely in the letter of attorney of the particular agent assuming to exercise the whole or part of the treaty-making power, the political departments may judge.

But when the invalidity results from the fact that the stipulation or provision is beyond the limits of the treaty-making power itself *ultra vires* of the people themselves, as we ourselves in our own courts define those limits so that the courts of the United States would, notwithstanding the action of the political departments of our own government, refuse to recognize it as the law here, they would recognize judicially that such an *ultra vires* act was null everywhere and not the law in Panama.

The limits of this power are variously defined as follows:

> "The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments."
>
> *In re* Ross, 140 U. S., 453.

> "The treaty-making power of the federal government must from necessity be sufficiently ample so as to cover *all the usual subjects of* treaties between different powers."
>
> *People* v. *Gerke*, 5 Cal., 383.

> "The President and Senate can make treaties which are not themselves repugnant to the Constitution. I further admit that, as by the usages of nations, the surrender of fugitives is deemed to be a proper subject for treaty, therefore it is competent for them to make treaties in relation to that subject."
>
> *Holmes* v. *Jennison*, 14 Pet., 589.

Now, if there is a limit, it is plain this oversteps it. The internal domestic police and government of the people are not "matters which in the ordinary intercourse of nations have been made the subject of negotiation and treaty."

They are not "proper subjects of negotiation with foreign governments."

They are not "the usual subjects of treaties between different powers."

The property rights of one power or of its citizens or subjects, in the territory of another, or reasonable provisions for the security of such rights, would be such usual or proper subjects of treaty. The act of Congress requires the President to acquire property rights and not only authority to protect those rights, or even to punish offenses against these rights, but the power to govern

the people in their conduct in no way affecting the canal or the property rights of the United States or any citizen. This is an essential part of what was required to be secured, and unless it has been lawfully secured there is no authority to proceed with the construction, or make any payments or issue any bonds.

But the treaty is even more objectionable, if possible, than the statute in this respect. Even if such a limited grant of law making power as the statute calls for, could be validly made by treaty, it is manifest that the treaty in this respect is wholly void. It is frequently disadvantageous to make too good a bargain. There is, as already indicated, a way in which this control of the territory could be secured, namely, by a cession of the territory, including, not excluding, Panama and Colon; but the treaty expressly leaves the sovereignty with Panama, and makes provision that the United States may not only protect its property and the persons and estates of its citizens, which are the only usual and proper subjects of treaty negotiations here involved, and may not only make police and sanitary regulations, but may even make laws for the people of the "zone" to obey, fixing their domestic relations and the descent of property.

The invalidity of such an attempted grant by treaty was declared by the Supreme Court in *Pollard's Lessee* v. *Hagan*, 3 How., 212:

> "It can not be admitted that the King of Spain could by treaty or otherwise impart to the United States any of his royal prerogatives."

The invalidity of the entire provision becomes more manifest, if other parties are substituted. The idea of Panama being an independent nation, is one that requires so active and constant an effort of the imagination, that attention is diverted.

Suppose Great Britain should conclude she wanted better access to the capital of Canada, and for that purpose came to the United States for the privilege to build a railroad or canal across the state of New York from New York to Buffalo. Suppose a treaty between Great Britain and the United States to be concluded in the exact language of this treaty. The United States granting to Great Britain "in perpetuity" the use, occupation and control of a "zone" in that case, however, an English not a Spanish word would be used. (As if they had occasion to refer to the payment of any expenses they would say "payment" instead of "amortization," indicating that some English speaking person had had some voice in framing the treaty instead of signing whatever was prepared for signature by the persons who were to get the money) across the State of New York, from New York to Buffalo, with all the rights, power and authority within the "zone" mentioned, which Great Britain would possess if she were the sovereign of the territory. Then suppose Parliament or a Commission appointed by Parliament to enact a code of laws for the government of this "zone." This is not a similar case, but the same case:

Now, suppose some person in this "zone," from New York to Buffalo, or in one of the two ports at the ends of the line, does some of the things forbidden by the Act of Parliament or the order of the Commission. He is arrested, taken before one of the courts of the "zone" by British authority, tried by such procedure, as they might choose to adopt, convicted and sentenced by the British court to imprisonment or death. The prisoner procures a writ of *habeas corpus* from an American court. Could any one claim he would be held? He would plainly have to be discharged. The treaty is void; the internal domestic police and government of the people, at

least in a republic, is not a proper subject of treaty negotiation; it is not a thing the treaty-making power is authorized to sell.

> "The people themselves can not do it, much less their servants."
>
> *Stone* v. *Mississippi*, 101 U. S., 814.

But under the averments of the bill admitted by the demurrer and of its own knowledge the court judicially knows that the same rule is the law in Panama.

The cities of Panama and Colon are not included in the "zone," but the same objection applies to them in a more modified form, but it is only a matter of degree. The statute requires as a condition, that the power to make police and sanitary laws referred to, shall extend to the ports at the end of the canal. When the canal is located it may be that Panama and Colon will be those ports. An attempt is made to grant the right to make police and sanitary regulations in those cities, but the general powers of Panama to govern their own people in those cities are to be active, but it is promised they will be allowed to lie dormant in the "zone."

As long as the sovereignty over this territory remains in Panama the power to govern it can not be sold in whole or in part, but must remain in Panama, and if for any time the legislature of Panama fail to exercise it, it is only because it chooses to forbear.

And the only possible method of vesting the power to make any laws for or control them in any degree is a complete cession of the entire territory, including Panama and Colon.

But the grant is further invalid because:

2nd. The United States has no constitutional power to buy such a grant or exercise such authority.

If the position already taken is sound, *i. e.*, that the internal domestic police and government of the people is not a proper subject of diplomatic negotiation, and a sale to a foreigner of such authority over them, is a transaction wholly repugnant to republican principles, it follows the United States cannot lawfully through its treaty-making power or otherwise, be made a party to such a transaction in any form; that such a treaty, or any treaty, which is an entirety, with its different parts mutually dependent, as this treaty plainly is, and of which such a grant is an essential part, can impose no obligations on Panama and can confer no rights on the United States.

Congress derives all its lawful authority from the constitution. That authority cannot be enlarged from any other source. This elementary rule has been in numerous instances applied to the judicial and to the other departments of the government. "Appellate jurisdiction depends on the constitution and acts of Congress. When these do not give it courts of the United States can not exercise it."

The Lucy, 8 Wall., 307.
Kelog v. *Forsyth*, 21 How., 85.
Ballaner v. *Forsyth*, 21 How., 89.
Gruner v. *U. S.*, 11 How., 162.
Sampson v. *Welsh*, 24 How., 207.

It was specifically applied to Congress in Pollard's *Lessee* v. *Hagan*, 3 How., 212. In that case the power of Congress to convey by grant the title to certain lands under the navigable waters in Mobile Bay was involved. It was insisted that even if Congress did not otherwise and generally have the right, in that particular matter it did, because of the terms of the agreement with Virginia and Georgia, for the cession of the territory constituting

the State of Alabama, or under the terms of the treaty with the King of Spain, by which the territory was originally acquired. The court held neither position well taken; that the whole powers of Congress were derived from the constitution, and could not be added to from any other source. The following pertinent language was used by the court:

> "When Alabama was admitted into the Union on an equal footing with the original states she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of the cession.
>
> * * * * *
>
> "Nothing remained in the United States, according to the terms of the agreement, but the public lands, and if *an expressed stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional authority to exercise municipal jurisdiction, sovereignty or eminent domain within the limits of the state or elsewhere, except in the cases in which it is expressly granted.*" (p. 223.)

The opinion then recites the cases in which the United States is so authorized, for example, the District of Columbia. The question of the rights of Congress in the matter under the treaty with Spain is then taken up.

> "If it were true that the United States acquired the whole of Alabama from Spain, no such consequences would result as those contended for. *It cannot be admitted that the* King of Spain could by *treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them.*" (p. 226.)

Suppose a man convicted in one of the courts in this "zone," and sentenced to punishment. He succeeds in

getting within the jurisdiction of a Federal Court. What can be done with him? It is proposed to punish him for violating an act of Congress. He has done nothing in the District of Columbia, nor in the territory of the United States, he has not robbed the mails nor counterfeited the coin, nor committed any crime against the United States in any state; he has done nothing which Congress has defined as piracy or an offense on the high seas; he is not in the military or naval service of the United States; he can of course not be guilty of treason; has in short done nothing the constitution authorizes Congress to forbid him to do. And yet it is proposed to hold him by federal authority.

The constitution certainly does not give, or attempt to give to Congress, any authority to legislate for foreign territory. Any power to make laws for any part of Panama can be derived only from Panama, and of course under the control of Panama. But

> "It can not be admitted that the Republic of Panama could by treaty or otherwise impart to the U. S. any of its sovereign prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them."
>
> *Pollard's Lessee* v. *Hagan*, 3 How., 212.

What is really attempted to be done is to erect this "zone" into a county, and appoint Congress the Board of County Commissioners. But this is a position Congress cannot constitutionally occupy. The duties of the two positions, first, as the lawmaking power of one independent nation; and, second, as a subordinate local lawmaking power under another nation, to which in its subordinate capacity, it owes allegiance, are inconsistent. Ye cannot serve two masters.

Suppose a war between the two countries. It would be the duty of Congress, as congress, to raise and support armies, to provide and maintain a navy, to invade Panama. After that work had been done, it would adjourn as Congress, and as the Board of County Commissioners of Canal County Panama, reassemble and provide for organizing and disciplining the militia of the county to repel the invasion of the hated foreigner, sift out those in the county liable to military duty from those exempt under Article XII, or as the inconsistency would be more likely to arise, it would be its duty as the Board of County Commissioners, doing faithful service to its superior, to get out of the United States all the traffic would bear, as Congress to obstruct every attempted holdup. This need not be followed further. It is plain the United States must have the exclusive services of Congress.

It is submitted, the conditions precedent upon which the act of Congress purports to authorize the proposed payments and further proceedings, have not been performed; and such proposed payments are not in consequence of appropriations made by law.

These considerations, if sound, would also establish the entire invalidity of the Act of April 30, 1904, for the government of the Canal Zone, including the attempted appropriation of ten million dollars to Panama. That act is an entirety, the different parts mutually interdependent. The first section directs the President to take possession of the "zone," describing it in the same language used in the treaty, and which it has already been argued is void for uncertainty; that the zone cannot be found to be taken possession of; hence this section provides for a physical impossibility. The second section

provides for the President to exercise full law making power over the zone, which it has been already argued the United States is constitutionally unable to exercise. This section therefore provides for a legal impossibility. If this reasoning is sound, and these main provisions of the act are invalid, of course the appropriation of the purchase price falls with the other sections.

The same reasoning leads to the conclusion that the Act of June 28, '02, is wholly invalid, not only are these things essential parts of that act so as to bring it within the rule that when the different parts of an act are so related to each other that it can not be supposed Congress would enact one part without all, the invalidity of one essential part makes all void.

But that rule is even not necessary here as the authority to issue bonds or pay money is expressly made dependent on the void provisions.

It was suggested during certain of the discussions of these measures in the Senate, that we are not dealing with Great Britain but with a "bantling," and that we should act accordingly. That we should ascertain what we wanted and say to Panama from time to time, that we understood the treaty thus and so, and Panama would have to accept our statement, and the treaty would be thus and so. It is quite possible, if the President should act on this advice and there were no laws to control him, that the United States could have what it wanted no matter what the treaty says. But that fact in no way affects any question involved here. The question before the court always is, What is the law? The fact that one party to a contract is strong enough to defy the law, is not a persuasive argument in court. Of course the United States can take anything it wants. So could

it have done that quite as well and with much more self respect, if no treaty had been made at all. But this appropriation and authority for bond issue are, as already indicated, conditioned upon the President's acquiring the rights described in the second section of the Act from *The Republic of Colombia by treaty,* and in determining whether that condition has been complied with, the treaty must be read and construed, and even if the same rights should be secured, otherwise than by treaty from The Republic of Colombia, or if the rights described or any essential part of them have not been lawfully acquired at all, the present appropriation would not be available nor would any bond issue be authorized. But this is a case that is not in the record, and there is no reason to suppose that the President would attempt to do or claim anything except what the treaty properly construed allows.

It has been claimed this discussion does not belong here, that the President is the exclusive judge of the construction of treaties, and the court must in all cases follow any construction he might adopt. This contention is clearly untenable, except under limitations. To make a law by either of the methods prescribed, by the constitution, requires the concurrent action of three agencies. The President, the Senate, and the House of Representatives, or the President, the Senate, and a foreign nation. A law to make which requires the joint action of three can not be changed by the separate action of any one of the three. Whenever the question arises, the court always inquires, What is the law; that is, what action was taken by the three. If, after a law was enacted by either of the two methods, the President could issue a proclamation declaring that the act of Congress or the treaty meant what the court can see it does not mean, and the courts were bound to accept that construction,

then the President alone makes the law. He must also construe statutes in taking care that the laws are faithfully executed just as he must construe treaties in dealing with foreign nations. The courts constantly construe treaties which are the law according to their own view. For instance, treaties with certain powers provide that the citizens or subjects of those powers may inherit property in the U. S.

The statutes of different states disqualify aliens but the courts enforce the treaties and disregard the statute.

Wunderle v. *Wunderle*, 140 Ill., 40.
Schlutze v. *Schultze*, 140 Ill., 290.
Hanenstein v. *Lynham*, 100 U. S., 483.

Now suppose the President should issue a proclamation declaring the courts had misunderstood the law in this respect, it is not conceivable that the courts would set aside the titles of those foreign citizens or subjects which the law, as made by the lawmaking power, has established.

If the President can thus abridge the lawful rights of aliens under a treaty, he could likewise construe the treaty by making concessions abridging the lawful rights of citizens. He could concede that under treaties, aliens were entitled to property held by the citizens whose titles the courts hold to be good. Of course he has no such power to make and unmake laws.

The President has important duties in making and enforcing treaties. He must determine what rights he will insist on for the United States, and what he will not insist on, and within constitutional limitations, that discretion is not open to review. But that by no means involves the conclusion that when the right of citizens de-

pends upon the construction of a treaty, the courts must surrender the terms and language of the treaty, and accept the *ipse dixit* of the President that the treaty is something they know it is not.

"The construction of them" (treaties) "is the peculiar province of the judiciary when a case shall arise between individuals."

Wilson v. *Wall*, 73 U. S., 83.

Rights suitable for enforcement in the courts and rights the enforcement of which depends on the political departments both arise out of treaties.

The question who owns a piece of real property in Illinois or Virginia is, of course, a question for the courts sitting in those jurisdictions to determine. When that depends on a treaty the courts read, construe and apply such a treaty according to their own view, as above shown. (See cases above cited.)

But that right may depend on political conditions or questions. The right of a plaintiff in ejectment or complainant in partition may depend on the political question whether the territory where he lives is the territory of the United States or of Mexico. In one case he is, in the other case he is not, entitled to inherit. Now, if the political departments of the government have determined the place of the domicil of such a complainant to be part of the United States or of Mexico, the courts might accept that and enforce in the supposed case the legal consequences of the sovereignty which ever was so established.

But suppose the President, after having determined the political question who is the sovereign of the territory, proceeds further and attempts to define the legal consequences of this fact he is authorized to find. Suppose he finds that the territory in which the supposed

claimant had his domicil was in Mexico, but that the persons living there should be held entitled to the legal consequences of American domicil. It is clear the court could not follow him in such inconsistencies.

The necessary legal consequence of the establishment of sovereignty over a territory is that the possessor of that sovereignty may make laws for that territory. The fact that he may temporarily choose not to exercise his rights or be prevented from exercising them does not alter the legal condition.

Such official constructions of this treaty as have been made are only to the point that the land is still Panama territory.

The principal public position taken by the Executive Department of the Government on the subject of these payments is in the construction of the statute, not the treaty. No one claims he is entitled to the last word on this subject.

In the message to Congress, December 7, 1903, this language occurs:

"When the Congress directed that we should take the Panama route, under treaty with Colombia, the essence of the condition of course referred, not to the government which controlled that route, but to the route itself; to the territory across which the route lay, not to the name which for the moment it bore on the map. The purpose of the law was to authorize the President to make a treaty with the power in actual control of the Isthmus of Panama. This purpose has been fulfilled."

This is all. There is no attempt here on the part of the President to say the treaty means "thus and so;" that the loose descriptive words in the treaty describe any definite strip of ground, that the attempted temporary grant of law making power is intended to be permanent, nothing but a statement that "the purpose of the

law was to authorize the President to make a treaty with the power in actual control of the Isthmus of Panama," and that this had been done. Notwithstanding such pronouncements from executive officers, courts inquire for themselves what the purpose of the law is. Suppose he President, in construing this statute, had taken one more step in the same direction, and no longer than the one in fact taken. Suppose difficulties had arisen in negotiating with Panama, and the President had concluded that the real purpose of the act was to construct a ship canal; that when the Congress directed that we should take the Panama route under treaty with Colombia, the essence of the condition, of course, referred not to the government which controlled that route nor to the route itself; but the real purpose of the law was to provide for the construction of a ship canal between the Atlantic and Pacific Oceans; that he had accordingly negotiated a treaty with the Republic of Mexico for a cession of the Isthmus of Tehuantepec.

The rights, whatever they might be, secured under such a treaty, would be just as lawful and would be respected by the courts just the same, and the position taken by the President against Mexico in asserting rights under that treaty would be respected and adopted by the courts, but this appropriation would not be available. Within constitutional limitations, the President may determine which of things that can be lawfully acquired by treaty we have secured by treaty, and it is quite immaterial whether Congress does or does not authorize the making of a treaty. The President, with the advice and consent of the Senate, is authorized by the Constitution, not by any act of Congress, to make treaties; but money is to be drawn from the Treasury of the United States by act of

Congress, not by treaty, at least not by this one, and while the President in the conduct of our foreign affairs may construe treaties, the courts read acts of Congress as they are written, and determine their meaning for themselves.

So far as this treaty has been construed by the political departments, that construction is merely but uniformly to the point that the territory is Panama territory.

See letter of the President to the Secretary of War, October 18, 1904. Speech of the Secretary of War at Cincinnati, May 26, 1905.

The Treasury Department has also recognized it by collecting duties from the Canal Zone to the United States.

The only thing that can be said to have been done by the Executive Department of the government is this: It has assumed that it had the right to make payments and has made them. It has taken possession of the property of the Canal Company and is making surveys. From this nothing more can be inferred than that the President has so construed the constitution and the statute and the treaty and assumed the validity of the statute and the treaty as to in some way reach a conclusion that he was authorized to proceed and nothing more. No one would claim that the conclusions of an executive official on such a question are final.

There are, it is of course admitted, some questions upon which the courts will follow the political departments. If those departments assert sovereignty over any territory the courts, generally speaking, will follow that conclusion and apply and enforce the legal results of such sovereignty. But if other departments should assert or deny the sovereignty of the United

States and should go further and assert different consequences of that sovereignty from what the court knows to be the legal consequences, the courts could not and would not try to follow both inconsistent rulings. If the President, for example, should assert that Arizona or Cuba was American territory, but that all people living there were liable to bills of attainder or *ex post facto* laws as might be passed or were liable to pay taxes as might be from time to time levied by the Sultan of Turkey, the courts when the question arose would, of course, disregard such opinions and enforce what they judicially knew to be the lawful result of the fact that the territory was American territory.

The same rule holds good in Panama. Under the averments of the bill admitted by the demurrer and of its own judicial knowledge the court knows the law on these subjects is the same in Panama as here.

All this territory is admittedly Panama territory. Panama retains that sovereignty. Therefore, allowing full effect to the construction of the treaty by the President on the political question what nation has the sovereignty over this territory, the further question what are the legal consequences of that sovereignty is a question for the courts. Nothing is more certain than that the courts of the United States if conditions were reversed, would under no circumstances recognize as the law in any United States territory any acts of a foreign legislature or resolutions of a board of directors of any railroad or trading corporation, foreign or domestic, any proclamations by executive officials to the contrary notwithstanding. The law is the same in Panama; the only difference being that Panama is not strong enough to protect itself against so powerful a subject as the United States if it chooses not to obey the law.

Suppose a conflict to arise in the courts of Panama between the two laws. Suppose, for example, under a present or future act of the Legislature of Panama lotteries are permitted throughout the republic. The resolutions of the board of directors of the interoceanic Railroad & Canal Company of North America, *alias* the Congress of the United States, forbid them in parts of Panama. In those parts of Panama a citizen of Panama conducts a lottery. The agents of the Railroad & Canal Company seize the man's person to punish him. He sues out a writ of habeas corpus from the court of the admitted sovereign of the country whose laws permit the things he has done. Suppose the judge to be either an honest or dishonest man—either a judge with a high sense of public duty and informed as to the law, or a corrupt judge trying to cover bad motives with good appearances. He orders the man discharged, holding the law passed by the admitted sovereign authority of the country is the law. He files an opinion in the exact language of our own Supreme Court in *Stone* v. *Mississippi*. What could be said by any representative of the United States?

But again, the President has only authority to act within the limits of the treaty-making power. His acts outside that power are void. The validity of treaties may be inquired into always. That is recognized in the judiciary and other acts. His assertions against foreigners and his concessions against ourselves or our own citizens outside those limits would of course not be followed. It is clear that within the limits in which his assertions of right are binding in our favor, his concessions are binding against us. For example, in *Foster* v. *Neilson*, 2 Pet., 306, if the President had conceded that the treaty with Spain did not transfer to the United

States the territory in controversy, the court would have followed that construction just as it did the contrary one.

But suppose a treaty between the United States and the Sultan providing that all persons in Pennsylvania should be held in slavery by the Sultan, and all in Constantinople by the President. The courts would, of course, disregard such a treaty, and if the Sultan should seek to hold any citizen of Pennsylvania under such a treaty, any court would discharge him. Slavery cannot exist lawfully in any territory subject to the jurisdiction of the United States. Or, to take an illustration in matters not within the prohibitive clauses, and not arising out of any express provision of the Constitution, consequently only locally applicable: Suppose a treaty between Great Britain and the United States, providing that Congress should make laws for London and Parliament for New York. This is as plainly void, because, as already argued, the internal domestic police of the people is not a proper subject-matter of treaty. In cases like this, when the treaty is void because beyond the limits of the treaty-making power, a letter from the Secretary of State asserting the rights or conceding the liabilities attempted to be granted or assumed would add nothing. The assertion by the President of a physical or constitutional impossibility is nothing.

While, then, it may be conceded that the case of *Doe* v. *Braden*, 16 Pet., 635, would prevent an inquiry by the court into the question whether the persons assuming to act for Panama in making this treaty were or were not the persons intrusted by Panama with the treaty-making power, that, therefore, the junta of speculators and the few mayors of towns who assumed to act for Panama must be regarded as Panama for this purpose; the court

is still not precluded from holding that when Congress has made this appropriation conditioned upon a certain legal result being accomplished by treaty with Colombia, and as the only attempted compliance, a treaty has been made with Panama, void because in excess of the treaty-making power, as we, ourselves, recognize the limits of that power, and void because of our constitutional inability to accept the grant, that the necessary condition precedent of securing the right to do and do lawfully and permanently these things in Panama has not been complied with, and the money cannot, therefore, be lawfully drawn from the treasury.

II.

THE LEGISLATION IS UNCONSTITUTIONAL.

Even suppose these difficulties overcome, the question then remains, has or has not Congress, under the Constitution, authority to employ the public funds arising from all sources, including taxes, imposts and duties, laid and collected, money borrowed on the credit of the United States, and the proceeds of the disposition of the territory and other property of the United States, in making or buying and operating commercial canals and railroads and conducting like enterprises, in foreign countries?

A question involving some, but not all, of the considerations applicable to this inquiry, namely, the power of Congress to make internal improvements, *i. e.*, ordinary public highways, or appropriate the public money, to assist others in making them, was in earlier times debated at great length in the other departments of the government.

There were two theories under which different things in this line were done or attempted:

(1) That Congress had the power under the commerce postoffice and war clauses to itself build ordinary public roads.

(2) That the clause giving authority to lay and collect taxes, etc., * * * to pay the debts and provide for the common defense and general welfare of the United States included the power to tax for any purpose within or without the Constitution which Congress might think would promote the general welfare. That this clause included the grant to Congress of the power to appropriate the proceeds of taxation to aid others in doing things it had no authority to do itself. The usual way in which it was exercised was in buying stock in canal, turnpike and similar private corporations —the modern municipal aid idea.

This utterly forced theory, manifestly unsound, long abandoned, wholly inapplicable to the facts of the present case (a concession by Mr. Monroe to what were supposed to be political exigencies), was very properly conceded by the assistant Attorney General below not to afford a basis for the present legislation. In this case it is proposed for the government on its own account to do something. In the brief filed below for the Secretary of the Treasury, the Assistant Attorney General stated that he was in doubt what the charge in the bill that the statute under consideration was unauthorized by the Constitution meant. That if it was intended to claim that there was no constitutional power in Congress to enact such legislation as the Canal Act, the complainant was ninety years behind the times.

This is a strange but absolute misreading of the history of this question. Nothing of special importance happened in this matter ninety years ago. Something of

great importance did happen eighty years before this act was passed, *viz.*, May 4, 1822; but instead of the establishment of the theory that Congress had the constitutional power to make roads and canals under the commerce postoffice or war clause, that was the date at which the theory was definitely and finally abandoned. At that date a bill making an appropriation to make repairs on the Cumberland road was vetoed by Mr. Monroe on constitutional grounds. He sent in an elaborate message denying the existence of the power. The bill was dropped and that was unanimously accepted and all effort to exercise such power was abandoned for eighty years, until June 28, 1902, when the bill now under consideration was passed. In the middle of this period the Pacific Railroad legislation was passed. But that was something entirely different, being not an effort by the government on its own account and by its own authority to build and operate those railroads, but a mere regulation of their construction by private corporations with private capital. The government did not itself attempt to build and operate those roads. A dictum by the Supreme Court in affirming the validity of the general provisions of this legislation, *i. e.*, the grant of the companies' franchises and their right to exercise the power of eminent domain, is probably responsible for the prevalence of an idea in some quarters in which the Assistant Attorney General seems to share that Congress in passing this act was merely exercising a familiar, long-established power. Whereas the plain fact is that this legislation is absolutely the first of its kind, not merely in the magnitude of the enterprise, but in principle. Its legal equivalent on large or small scale is not to be found in prior federal legislation.

The general line of legislation as to these Pacific roads has been approved by the courts, but the legality of any appropriations—or pledge of public credit, rather (there were no appropriations)—was not involved. It is true that these measures have been acquiesced in without much protest.

The fact that an act has not been drawn in question in the courts, and has been acquiesced in by the people, is a very slight argument in its support. Legislation of this character by Congress is very difficult to attack by a citizen. Special taxes, the collection of which can be resisted at home, are never laid, and to oppose the legislation involves burdensome and expensive litigation against powerful opponents in distant courts, and calls upon the citizen for greater sacrifices than are ordinarily within his reach. He is therefore usually bound to acquiesce.

Again, so far as public acquiescence is concerned in any measure, it can only imply approval of or acquiescence in the particular thing done. A judicial decision establishes general principles. Public silence only means toleration of the particular thing done; as, for example, the guaranty of the bonds of the Union Pacific Road. A man owns an orchard; the boys and neighbors have, without objection from him, for a long time eaten his fruit. From this it might be inferred that he was willing that his neighbors should have some apples; but it would be a *non sequitur* to conclude from this that he has given his assent to larceny as a general principle, and was therefore estopped to complain of the man that carried off his watch and his clothes.

Even that power, *i.e.*, for the United States itself directly to build ordinary public interstate highways, has never been

affirmed by the courts, much less the immeasurably greater authority necessary to sustain the present legislation, and has long been abandoned.

Early legislative opinion was somewhat divided, even as to this lesser power nobody in early times thought of such legislation as this. The Executive Department seems to have been unanimous against the claim of power. But even if the legislative and executive departments had acted consistently on one theory, their authority is by no means conclusive. The theory on which courts have proceeded, and the great caution they have exercised, in declaring the invalidity of statutes, needs revising. The courts should, of course not act hastily or without due consideration in so important a matter. It is a serious matter to avoid an act of Congress, but it is also a serious matter to violate the Constitution. It is said, in substance, that legislators are also charged with the duty of upholding the Constitution; and it must be assumed that every legislative and executive officer, before he acts, carefully compares what he is about to do with the Constitution, and studiously tries to obey, and for the court to condemn his act is to assume that he either does not know or is unwilling to perform his duty.

In this case any such presumption has been clearly rebutted. When a witness is found making one plainly untruthful statement, his evidence may be discarded, the presumption in his favor being thereby reversed. So, when in a statute we find such provisions as that the United States shall make laws for foreign territory, and that future congresses may appropriate 135 million dollars but no more, the presumption that should rather be indulged is that the Constitution was not in all their thoughts.

But it is submitted that this theory of care on the part of legislators to avoid overstepping the limit of their power has very little foundation in fact; and this is not an adverse criticism on the other departments of the government. Everybody, senators and representatives included, is presumed to know the law; but this is a violent, though necessary, fiction.

The most conscientious and patriotic senator or representative, when a measure is presented, the policy of which he approves, but the constitutionality of which he doubts, may very fairly reason that if he exercises the power claimed, and it is in excess of his authority, the courts will protect the citizen. But if, on the other hand, he votes against the measure, he may fail to use a power the Constitution has given him in a manner his judgment tells him would promote the general welfare; and unless he does act, the question of his power cannot be tested. You can't tell whether a garment fits you till you try it on. He therefore almost invariably decides on the policy of the act, and leaves its constitutionality to the courts.

Such constitutional discussions as occurred in 1817 and 1818 as to the limits of the powers of Congress to make internal improvements are obselete in Congress. The only attention the constitution gets there is an occasional question whether an act can "pass muster in the courts."

Again, a legislator or President or Cabinet officer approaches these questions in the spirit of an advocate. The same objection exists against allowing his judgment controlling force which applies against allowing a man to be a judge in his own cause. It is not merely that a party is unwilling to do justice to his adversary, but, as men are constituted, it is very difficult for them

to see that a thing in their own interest, or which they greatly desire, is wrong. For example, no one doubts that the Electoral Commission was composed of fifteen able and patriotic men, nor that each of the commissioners on every question there presented gave his honest judgment of the law of the case; but it is impossible to believe that if those fifteen men had composed a court hearing a cause between indifferent persons, in the outcome of which the members had no concern except to see that justice was done, the eight Republicans would have uniformly found that every proposition favoring one side was right, and every proposition favoring the other side was wrong; and the seven Democrats would on all those questions have reached the contrary conclusion.

But even legislative and executive precedent do not sustain this claim, even of power to make ordinary highways. Of the five Presidents who had to do with the question, Jefferson, Madison and Monroe distinctly and in public messages denied it. Adams was noncommittal; Jackson only discussed the power of appropriation, *i. e.*, the municipal aid theory, in vetoing a bill to buy stock in a turnpike company, and denied that, the other power being obsolete in his time and also in the time of Adams. The authorization of the Cumberland Road, which is the authority always cited, was made before the question was raised; and that whole measure, being a mode of disposing of the territory of the United States, and all with the consent of the states, which was specifically required, was of such peculiar nature as to afford no precedent for anything not in all respects like it. Later an act was passed by a narrow majority, the minority favoring its policy, but objecting on the ground of its unconstitutionality, establishing the bonus paid by the United States Bank

for its charter, and the dividends expected to arise from the government stock in that institution, as a fund with which to make internal improvements. This bill was vetoed by Mr. Madison, though favoring its policy, yet holding it to be unconstitutional, and recommending an amendment to authorize it.

Later the act already referred to was passed to appropriate funds to make repairs on the Cumberland Road. This act was vetoed by Mr. Monroe on the same grounds.

Later an act was passed under the municipal aid appropriation theory for the purchase by the government of stock in a turnpike company organized to build a road from Maysville to Paris, Kentucky. Jackson vetoed that bill on constitutional grounds, protesting against the whole doctrine, but stating the particular improvement was local, not general, hence not allowable anyhow, though not discussing any claimed authority of the government to itself make the improvement to which aid had been extended. None of these bills was passed over the veto of the President, and both those departments of the government for eighty years, since May 4, 1822, have accepted and acted on the doctrine of their lack of power to make improvements of their own authority. All these measures were defeated by their friends. Jefferson, Madison and Monroe, in their public messages denying the power, recommended an amendment to give the power. While legislative and executive precedent in favor of any claimed power is not strong evidence of its existence, yet when the friends of a measure hesitate and finally refuse to act because the authority for what they desire cannot be found, such action has all the force of a judgment against himself by a party acting as judge in his own cause.

It should also be noted that the majority of Congress, even in those days, was always against the proposition that any one of the powers of Congress gave the necessary authority. In a few instances, the sum of the members who affirmed that it could be found in the taxing clause but could not be found in the commerce clause, or other clauses, and those who affirmed it could be found in the commerce clause but not in the taxing and other clauses, etc., did make up narrow majorities; but, while the records are not very complete, I believe the statement to be entirely safe that the majority of each house of any Congress that attempted to exercise this power can be quoted against the sufficiency of each of the several powers. But one power must of itself support any action of Congress completely or not at all. If a proposed measure is a regulation of interstate or international commerce, it can be completely supported by the commerce clause, otherwise it can derive no assistance from that clause. A measure that is neither a regulation of commerce nor an establishing of a postoffice or post road nor a declaration of war nor a laying of taxes so that no one of those powers would uphold it cannot because it may have some general relation to these several things take one-fourth support from each and thus get four-fourths of constitutional authority. One power alone must furnish complete support or none.

Further, the utmost power there contended for by any body, *viz.*, the right to build common public roads, would fall very far short of what is needed here.

Unless the unanimous action of all the Presidents denying this power during the entire time when the power which would be a part of that here involved, *i. e.*, the power of the government to itself of its own

authority make even internal improvements, and the abandonment for eighty years of the claim (not referring, of course, to the building of common public roads in territories), and the similar abandonment later of the other claim, *i. e.*, the municipal aid theory not here involved, amount to such an adverse precedent as to conclude the inquiry and establish the non-existence of this power, the inquiry, it is submitted, is, unless adversely concluded, entirely open. What is the authority of congress?

The provisions of the constitution relied upon by the advocates of the power to make internal improvements and there are no others from which authority could possibly be deduced, are: the taxing, post-office, war and commerce clauses.

This measure is, by the counsel of the appellee, referred to the commerce clause and, necessarily, so as whatever may be said as to common public roads the business of building and operating railroads and commercial canals is commerce and has been repeatedly so held, hence any authority for such a measure must be found in the commerce clause only.

I.

This measure can derive no support from the power to regulate commerce among the several states, with foreign states and with the Indian tribes.

First. The power is to "regulate" not to carry on commerce. The power to regulate commerce is the power "to prescribe the rule according to which it shall be carried on or governed."

This definition runs through all the discussions of the subject, from *Gibbons* v. *Ogden* to the most recent cases.

Gibbons v. *Ogden*, 9 Wheaton, 1.

Cooley v. *The Board of Port Wardens*, 12 How., 299.

Welton v. *Missouri*, 91 U. S., 279.

Tiernan v. *Rinker*, 102 U. S., 123.

Gloucester Ferry Co. v. *Penna.*, 114 U. S., 196.

Interstate Commerce Commission v. *Brinson*, 154 U. S., 447.

E. C. Knight Co. v. *The United States*, 156 U. S., 1.

Addyston Pipe, etc., Co. v. *The United States*, 175 U. S., 211.

Northery Securities Co. v. *U. S.*, 193 U. S., 197.

But this definition, when announced by the Supreme Court, was not new.

When the bill to set aside the bank bonus as a fund for the making of internal improvements was considered in February, 1817, Mr. Calhoun opened the argument, contending that the necessary authority was in the general welfare expression in the taxing clause, and it was not necessary to deduce it from the enumerated powers, or it might be found in such powers, the postoffice clause being, in his judgment, the proper one, though the postoffice reference is purely incidental. He was followed by Mr. Pickering, who denied Mr. Calhoun's claim that the general welfare or postoffice clause gave authority, but said that if the power existed it must be an "implied power under the express power to regulate commerce." His remarks on that occasion embodied the substance of the argument repeated by all others who have derived this

power of making improvements from the commerce clause. He said:

> "But, while the gentleman from South Carolina was speaking, it had occurred to Mr. P. that if Congress had power to make roads and canals, it must necessarily be an implied one, and under the express power to regulate commerce with foreign nations and among the several states and with the Indian tribes. To give facility and safety to foreign commerce, and to that between the several states in what is called the coasting trade, Congress has caused lighthouses and beacons to be erected, piers in rivers to be constructed, and the coast to be surveyed to ascertain and mark dangerous shoals. But commerce, which consisted in the exchange of commodities, is carried on by land as well as by water, and if Congress, under the clause for regulating commerce, could rightfully do what from the foundation of the government we have been doing, and without a single objection, erecting lighthouses and beacons and piers to give facility and safety to commerce by water, why should they not exercise the like power to facilitate, secure and render less expensive by means of roads and canals the commerce by land? This, as it occurred, Mr. P. suggested for consideration."
>
> Annals of Congress, Feb. 4, 1817, p. 859.

The argument was also made that when the states transferred to the United States the power to regulate commerce, they transferred all the rights and authority they had formerly exercised under the same power, that the states had built roads and canals, and therefore Congress could.

To all this, repeated *ad infinitum*, Mr. Barbour, of Virginia, afterwards a Justice of the Supreme Court of the United States, replied that the power to regulate commerce did not mean, as claimed, the power "to regulate, facilitate and promote commerce," which was the defini-

tion claimed by the supporters of this clause as the source of that power, but this:

> "To regulate commerce among the several states *meant the right to prescribe the manner, terms and conditions on which that commerce should be carried on.*"
>
> Annals of Congress, Feb. 6, 1817, p. 897.

Again, after the veto of the bank bill and the message of Monroe on coming into office, denying the power, the question came up on motion to adopt a resolution, and was discussed at length. Mr. Barbour, again taking the leading part against the resolution, said:

> "He therefore understood the power to regulate commerce among the several states to authorize us to *prescribe the terms, manner and conditions on which that trade should be carried on.*"
>
> Annals of Congress, March 7, 1818, p. 1158.

He further argued that, while it was true that the states had had the power to make roads and canals and still had such power, that was not as an incident to a special power to regulate commerce, but a part of their general power to promote the general welfare. He said:

> "The error of this argument consisted in this, that the power to make roads and canals existed in the state governments, not merely as an incident to any other power, but as a substantive, independent attribute of sovereignty."

This was the substance of that controversy, the one side contending that the power to regulate commerce meant the power to "facilitate and promote commerce in all appropriate ways;" that building lighthouses had been allowed from the beginning without objection; that roads and canals on land were analogous to lighthouses on water, and when the states granted this power, they trans-

ferred the full measure of their authority on the subject, and as the states had always built roads and canals, that authority went with the grant of power to regulate commerce.

On the other hand it was insisted that the power to regulate commerce meant the power "to prescribe the manner, terms and conditions upon which it should be carried on," and the power in the states to make roads ad canals was an independent power not incidental to any specific power to regulate commerce.

This definition was by both the advocates and the opponents of the claimed power to make roads and canals considered not to be broad enough to embrace that power. Its accuracy was disputed and other definitions given because not broad enough to embrace the right to make lighthouses, which had been done from the beginning. No one attempted to show that the power as thus defined would give the necessary authority. The bill passed, was vetoed March 3, 1817, by Mr. Madison. The veto of the bill to repair the Cumberland Road followed in 1822. This ended the fight. The claimants of the power practically surrendered; and the attempt to make such improvements by the direct action of the government was abandoned till June 28, 1902.

Then came *Gibbons* v. *Ogden*, and the commerce clause of the Constitution came up for consideration, and it became necessary for the Supreme Court to define the terms.

That court then announced the definition that has been adhered to ever since:

> "To prescribe the rule according to which commerce should be carried on."

Verbatim, except a small condensation, Mr. Barbour's definition. The exact language of the persons denying that the power was broad enough to include the power to make ordinary public roads and canals; the exact definition that had been given in Congress seven years before and was universally known and accepted as excluding from the limits of this clause of the Constitution the power to make roads and canals.

Later the Supreme Court did away with even this slight verbal discrepancy, by defining the definition in the identical terms used by Mr. Barbour, defining the word "rule," used by the court, by the term "condition" used by Mr. Barbour.

> "To regulate commerce is to prescribe rules by which it shall be governed; that is, the *conditions* upon which it shall be conducted."
>
> *Welton* v. *Missouri*, 91 U. S., 275, 279 and 280.

This language is quoted and approved in *Tiernan* v. *Rinker*, 170 U. S., 173; and in *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447.

This definition, it will be noted, was not argued, but simply stated as a thing already fully understood that required no argument. It was necessary to define both the verb and the object, both "regulate" and "commerce." The meaning of "regulate" had, however, been already given in well-known and accepted public discussions; therefore could be simply stated; but the extent of the meaning of the noun "commerce" had not been covered in those discussions; it was therefore necessary to argue this at length and in detail. This definition has been steadily adhered to from the time it was announced. The latest expression of the Supreme Court was this:

"Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice Marshall in *Gibbons against Ogden*, 9 Wheaton, 1, pp. 196, 197. That the power of Congress to regulate commerce among the states and with foreign nations is the power to prescribe the rule by which that commerce is to be governed." (*Northern Securities Co.* v. *United States*, 193 U. S., 335.)

The lighthouse argument was also disposed of in the same case, *Gibbons* v. *Ogden*. It was insisted in argument that the power to regulate commerce was not exclusive; that the states also could exercise that power concurrently, and in proof it was pointed out that the states were constantly erecting lighthouses, their right to do so not being disputed. The court said:

"A state, it is said, or even a private citizen, may construct lighthouses. But gentlemen must be aware that if this proves a power in a state to regulate commerce, it proves that the same power is in the citizen. States or individuals, who own lands may, if not forbidden by law, erect on those lands what buildings they please. *But this power is entirely distinct from that of regulating commerce*, and may, we presume, be restrained if exercised so as to produce a public mischief." (p. 208.)

"These acts were cited at the bar for the purpose of showing an opinion in Congress that the states possess concurrently with the legislature of the Union the power to regulate commerce with foreign nations and among the several states. Upon reviewing them they do not establish the proposition they were intended to prove; they show an opinion that the states retained powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress." (p. 209.)

Mr. Barbour's argument on that subject exactly. The power of Congress to build lighthouses and make

improvements in the navigable waters will be considered later.

From that time until now this has been accepted. So far as I am advised, since the opinion of the court in *Gibbons* v. *Ogden* was pronounced till now, no claim has been made in any responsible quarter that the power to regulate commerce among the several states with foreign nations and the Indian tribes included authority for the government to make on its own account and of its own right even internal improvements. Under Mr. Monroe's peculiar theory, that Congress was authorized by the general welfare terms in the taxing clause, to devote the proceeds of taxation to other than constitutional purposes, appropriations continued for a time to be made to aid in building roads and other improvements, constructed under state authority and in the territories, principally by subscribing to stock of private corporations organized for such purposes, the modern municipal aid scheme.

But nobody attempted to defend these things, done since May 4, 1822, as an exercise of the power to regulate commerce. Congress did not have to ask the permission of the states to regulate interstate commerce, to establish postoffices or post-roads, or to declare and carry on war; but as the authority for what was being done was merely a claimed inferential power to appropriate money to anything which would promote the general welfare, and not a claimed power to do itself the things which they could appropriate money to aid, the consent of the states had to be and was secured to such expenditures as were made within their several borders. This was also true of the Cumberland Road. Monroe's veto was in 1822, *Gibbons* v. *Ogden* in 1824, Jackson's veto of the Maysville Road bill in 1831. Arguing the question and denying the power then

claimed, *i. e.*, the power to donate public money to private corporations, but not on the commerce clause. Judge STORY published his work on the Constitution in 1833. He was an ardent supporter of the only power of Congress in this respect then claimed by anybody. His work includes an elaborate argument in its defense. He not only makes no effort to base the power on the commerce clause, but throughout the whole lengthy detailed discussion does not once refer to it, either as representing his own views or the views or arguments of any friend or opponent that required to be either supported or opposed. The subject is discussed in the chapter devoted to the taxing clause, and he says expressly, not as a matter to be argued, but as an understood matter of course, that the construction of that clause, *i. e.*, the taxing clause, involved the question "whether Congress can appropriate money to internal improvements."

Story on the Constitution, Sec. 958.

Gibbons v. *Ogden* had disposed of the other theory by adopting the definition of regulating commerce, that plainly excluded it, framed, in the very words of the opponents of the theory.

The Pacific Railroad legislation was referred to the commerce clause, but that was something entirely different from the things theretofore done by the government; and from the legislation now under consideration, as the present act is wholly beyond and unlike anything that has gone before. Those Pacific Railroad statutes being not an attempt by the government to itself build and operate those railroads, but a prescribing the manner, terms and conditions according to which private corporations should build them.

These acts, therefore, do not furnish an exception

to the statement that since *Gibbons* v. *Ogden* it has been the accepted theory of all students of the Constitution that no support for legislation of that character could be derived from the commerce clause.

2nd. The power is to "regulate" not to carry on commerce.

There is a manifest distinction between the ordinary public highway which was all any one ever claimed power to make till now, and what is attempted to be provided for by the present legislation. While it is true that railroads and such commercial canals as here proposed have some of the elements of public highways and on that theory (forced but necessary), the power of eminent domain is allowed to be used in their construction and they are subjected to governmental control to a greater degree than other forms of property, yet they are something altogether different.

Such a road or canal is in reality a mere plant for carrying on commerce.

The construction and operation of such "highways" as has been repeatedly adjudged is carrying on commerce, and is regulated as such.

U. S. v. *Trans. Mo. Freight Assn.*, 166 U. S., 312.

State Freight Tax cases, 15 Wall., 232, 275.

Tel. Co. v. *Texas*, 105 U. S., 460, 464.

U. S. v. *Joint Traffic Assn.*, 171 U. S., 515.

California v. *C. P. R. R. Co.*, 127 U. S., 1.

Cherokee Nation v. *S. K. R. R. Co.*, 135 U. S., 641.

Luxton v. *N. R. B. Co.*, 153 U. S., 525.

The present legislation provides for the United States to carry on commerce. No attempt is made to prescribe a rule according to which all persons, or any person,

building or operating canals and railroads are to be governed, but the provision is that the United States shall directly on its own account, using the public money as capital therefor, construct and operate this canal, and buy and operate a railroad for profit, just as any private canal or railroad company, or any other "company of adventurers," and as successors to private corporations that have failed. This is the citizen's part of commerce.

> "Commerce among the several states, as was early held by this court, in *Gibbons* v. *Ogden,* 6 Wheaton, 448, means *Commerce between the citizens of the several states,* Miller, J., in *Stoutenberg* v. *Hennick,* 129 U. S., 141, p. 147."
>
> "Commerce among the several states consists of intercourse and traffic between their citizens."
>
> *Gloucester Ferry Co.* v. *Penn.,* 114 U. S., 119-203.

This is a government, not a railroad corporation, or a canal corporation, or trading corporation of any kind, and is as plainly outside the line of its duties, and as plainly oversteps the limits of its powers, when it assumes to perform the duties and exercise the powers of such a corporation, as a trading corporation would be in undertaking to carry on war. The government must have money, but the means provided by the constitution are to levy taxes, dispose of the territory and other property of the United States, and to borrow money on the credit of the United States. To earn money is not one of the ends set out in the preamble for which the government was established; nor is it among the means by which its treasury may be replenished. Congress cannot lawfully use the public funds to buy, equip and operate a dry goods store, a mill to manufacture steel rails, or anything else for sale to the general public; nor engage in the general transportation business, or build and operate

a railroad not made a post-road or military road, but as a mere business venture; but if the measure is to be supported by the commerce clause it must establish the right to so carry on business not in any way connected with Post Office or war objects. It will be argued later that the fact that the war or navy or post-office department might need the things dealt in, and were therefore possible customers, does not change the matter; but for the present, it is sought to establish that as a mere matter of commerce, under the commerce clause of the constitution, Congress has no power to engage in carrying on commerce. This is for the government to abandon the business of government and go about the business of the governed.

Third. The power to carry on commerce cannot be implied from the power to regulate it.

The term "implied powers" in general use, is unfortunate and inaccurate. The better term is that used in *Gibbons* v. *Ogden*, "included," or "comprehended powers."

A grant of powers to do one thing implies no power to do anything else. It *includes* a full choice of means, but the thing proposed to be done must always be the particular thing authorized; thus, navigation is commerce. Consequently Congress may regulate navigation, "because in regulating navigation, it is regulating commerce." *Gibbons* v. *Ogden*, 9 Wheaton, 1.

But no matter how nearly anything else may be related to commerce, or how dependent upon that something else commerce may be, Congress may not reach it under this power. Production is indispensable to commerce. Without production, as agriculture, mining and manufacture, bringing into existence the subjects of com-

merce, commerce cannot exist. But this clause of the constitution gives Congress no power to regulate production, because production is not commerce. *E. C. Knight Co.* v. *The U. S.*, 156 U. S., 1. So the power to *regulate* commerce includes or implies no authority to do anything but regulate it. A full choice of means is allowable, but the means, whatever they may be when selected and employed, must be regulation.

Such a power is not to be implied. The nature of power that may be implied is pointed out in *McCullough* v. *Maryland*, 4 Wheaton, 401. The court says:

> "The power of creating a corporation though appertaining to sovereignty is not like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power which cannot be implied, as incidental to other powers, and used as a means of executing them."

But the power to carry on commerce, if it exists, is a great substantive and independent power, the exercise of which would have quite as great and far reaching an effect on the people as any other one power in the list and hence can not be implied as incidental to other powers and used as a means of executing them.

Fourth. But even if instead of providing that the United States should carry on the commerce described in the bill, the act had attempted to "prescribe the rule by which it should be carried on, it would be invalid because the commerce affected by the legistation is not the the commerce the constitution subjects to the control of Congress. The commerce Congress is authorized to regulate, is commerce among the several states and with foreign nations and the Indian tribes. "The enumeration presupposes something not enumerated," and excludes all not enumerated.

Gibbons v. *Ogden, supra.*

The commerce affected by this legislation is the internal commerce of Panama. The business proposed to be carried on is the business of transporting for hire, vessels of all nations from one point in Panama to another point in Panama. It is true that both these points being on the seaboard, and consequently accessible to all parts of the world, including the different parts of the United States, the canal between them might form a part of the voyage of a vessel bound from a port in one state of the Union to a port in another or to a foreign country; and if located in the United States, its use for that purpose might be regulated by Congress under the authority of the *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S., 114 as a connecting link in a line of interstate or international commerce; but it is only to the extent that it is so used, that such a line can be regulated. The Daniel Ball, 10 Wall, 557, "The state regulates instruments of commerce wholly within their own territory, and have full control *except when employed in foreign commerce*. *Hall* v. *Decuir*, 95 U. S., 488, *Transportation Co.* v. *Wheeling*, 99 U. S., 273. But the great bulk of the commerce proposed to be controlled here is entirely different. A vessel bound from Liverpool to Peru or Australia, passing *en route* through a foreign country, and at no point touching United States territory, can by no means be said to be engaged in commerce between citizens of different states, or between citizens of one state and foreign countries or Indian tribes. The business of carrying such vessels on such voyages, through foreign territory, the entire contract being made and fully performed in such foreign territory, is the internal commerce of the foreign country. Even if Panama were made a county of Louisiana this commerce would not be interstate commerce. The fact that one party to a trade

completely carried out in a state is a foreigner, does not change the character of the commerce, it is still local, not interstate or international.

Paul v. *Virginia*, 8 Wall, 168.

Now, even if the small portion of the traffic expected for this canal in which American commerce was concerned, were the kind Congress is authorized to regulate, it is only to the extent the canal is so used that its use could by any means be held as part of interstate commerce.

"So far as she was employed in transporting goods destined for other states, however limited, she was, *so far as it went*, subject to the legislation of Congress."

The Daniel Ball, 10 Wall, 557.

There are some regulations of interstate commerce providing for the safety of ships or trains carrying interstate traffic that all using those ships or trains must of course observe.

But aside from this incidental effect Congress has not and has never claimed any power over other than interstate traffic carried on over interstate railroads. For example, cannot regulate the rate of charges of any other traffic. But the complete control of the commerce just described manifestly not interstate or international is an essential part of this act. The act is manifestly an entirety and the expenditure would plainly not be made if this other commerce had to be excluded.

Rather as interpreted authoritatively it is this "Worlds Commerce" not the commerce of the United States that is the especial concern of the whole act.

The entire act is therefore void.

Fifth. Even if a power to carry on commerce could be implied from or included in a power to regulate it, the legislation could still not be supported because, what is proposed to be done is outside the territorial limits of the United States. The implication can of course go no further than the original power from which it is derived. Even if to "regulate" could be so construed as to "include" to carry on, it would not extend the meaning of the enumerated kinds of commerce, but would of course mean only to carry on such commerce as Congress was entitled to regulate, in other words, that Congress might, for the United States, carry on such commerce as Congress is authorized to prescribe the rule for; but Congress has plainly no power, and none is attempted to be given it, to prescribe the rule according to which mercantile transactions in Amsterdam or Panama shall be governed. The widest expression on the subject is, that under this clause, Congress has power to regulate the classes of commerce described, "throughout the length and breadth of the land," *Addyston Pipe, &c. Co.* v. *The U. S.*, 175 U. S., 211, not throughout the length and breadth of the whole world.

Any power to regulate commerce in Panama must be derived from Panama. It has already been argued that this cannot be done. That the entire power of Congress must come from the constitution. That Panama cannot give nor the United States receive from Panama or exercise any such authority. But the present inquiry is as to the extent of the power granted by the commerce clause of the constitution. That clearly cannot extend beyond the limits of the United States.

Sixth. Some language was used in *California* v. *Central Pacific R. R. Co.*, 127 U. S., 1, repeated in *Cherokee*

Nation v. *S. K. R. R. Co.*, 155 U. S., 641; *Luxton* v. *N. R. B. Co.*, 153 U. S., 525, that would require explanation if the present project were one to construct a railroad or canal in the United States.

In *California* v. *C. P. R. R. Co.*, 127 U. S., 1, the court says:

> "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct or authorize individuals or corporations to construct national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent; the Cumberland or National road, being the most noted instance. It's execution was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But, since, in consequence of the expansion of the country, the multiplication of its products, and the introduction of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the territories of the United States, and its power to grant franchises, and exercise all therein, are and ever have been undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agencies of state as well as federal corporations." (See Pacific R. R. Removal cases, 115 U. S., 14-18.)

This language must of course be taken in connection with the cases in which it was used. These cases did not at all involve the question of the power to construct the road or the bridge in consideration there, or to appropriate the public money for that purpose, or the power of Congress to build and operate them for profit. Though there was in that legislation provision for loaning the government credit to these enterprises that feature was not involved but only the validity of the franchises and the right to take land by eminent domain. The legislation, the validity of which was affirmed, was merely a series of laws regulating the construction of interstate railroads and of a bridge over a stream dividing two states, by private persons or corporations, with private capital. Some question had at an earlier time been made as to the power of Congress under the commerce clause to regulate transportation by land. The Daniel Ball, 10 Wall, 557. Though it is not seen why it should ever have been thought doubtful. Thus in *U. S.* v. *R. R. Bridge Co.*, 6 McLean, 517-524-525, Mr. Justice McLean said:

> "The latter power (P. O.) has generally been considered as exhausted in the designation of roads on which the mails are to be transported, and the former (commerce) by the regulation of commerce upon the high seas and upon our rivers and lakes."

In the Daniel Ball, 10 Wall, 567, the court refrained from expressing an opinion as to the power to regulate (and it was a mere regulation in that case) commerce by land.

The denial of the power of Congress to pass the laws then under discussion, as suggested in the opinion, might leave Congress "without authority to regulate one of the most important adjuncts of commerce," but the denial of the authority to itself, with the public money, to build

and operate such highways and bridges, no more interferes with the authority to prescribe the rule according to which they shall be built and operated, than the denial of the power to build and operate a plant for the manufacture of sewer pipe, would leave it without authority to regulate the interstate commerce in that article. Congress has never built or operated such factories, but is effectively regulating that commerce. *Addyston Pipe &c. Co.* v. *The U. S.*, 175 U. S., 211, and has never built or operated railroads but is effectively regulating that commerce.

All that was decided in those cases was, that the term "commerce," as used in this clause of the constitution, meant and included intercourse by land as well as by water; and the power to regulate commerce included the power to regulate interstate transportation by land conveyances, and the building of interstate roads.

Even if this language should be construed as an assertion of the power in Congress to directly make and operate the railroads in question it would not conclude this inquiry.

For the court in this case to decline to form an independent judgment, or to give controlling weight to anything that may have been said, if anything was said, in *California* v. *The Central Pacific Railroad Company*, *Luxton* v. *North River Bridge Company*, and like cases, upon the power of Congress to directly construct and operate the roads, where nothing was involved except the power to regulate their construction and operation, is to run directly counter to the express injunctions of the same court. In *Cohens* v. *Virginia*, 6 Wheaton, 264, the court was pressed with some language in the opinion in *Marbury* v. *Madison*, not necessary to the decision. In de-

clining to be governed by that opinion in that respect the court used the following language:

> "It is a maxim not to be disregarded, that general expressions in every opinion, are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected but ought not to control the judgment, in a subsequent suit where the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered to its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

This language was quoted with approval, and its principle acted on in *Carroll* v. *Carroll's Lessee*, 16 Howard, 275, p. 287; and later in *Northern Bank* v. *Porter Township*, 110 U. S., 608, p. 615.

In a great case recently decided in the Supreme Court of the United States, the question was whether the terms 'throughout the United States" as used in the taxing clause, meant throughout the several organized states, or throughout the entire territory organized and unorganized. In that case, there was cited an opinion of the Supreme Court by Chief Justice Marshall, not containing an incidental reference to that question such as is made in the quotation from *California* v. *The Central Pacific Railroad Co.*, to the power of Congress to construct roads, but an elaborate direct discussion of the exact question that in the later case was presented for decision.

Loughbrough v. *Blake*, 5 Wheaton, 317.

But the Supreme Court did not accept this as authority, distinctly disregarding it because the question was not involved in the case presented.

Downes v. *Bidwell*, 182 U S., 244, quoting and approving the above language of Chief Justice Marshall in *Cohen* v. *Virginia*.

If such language as that used in *Loughbrough* v. *Blake*, from such a source, can be disregarded as dictum, the unguarded and unnecessary incidental expression, in the quotation from *California* v. *The Central Pacific Railroad Company*, should cause no embarrassment.

Nor does the opinion in that case show that the court meant to assert, even as dictum, anything as to the power of Congress to itself construct and operate the roads referred to.

The opinion says:

> "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states as well as to provide for postal acommodations and military exigencies had authority to pass these laws."

This does not touch the question. "These laws" as indicated were laws not for the construction and operation by the United States of the railroads in question, but laws prescribing the conditions upon which private individuals or corporations should construct and operate them. The bond feature was, of course, not in question. The question was as to the validity of the franchises granted by Congress and the power of California to tax them.

The other cases were eminent domain cases. None involved the legality of the bond guaranties which were manifestly only good because done by common consent. But the opinion proceeds:

> "The power to construct *or* authorize individuals or corporations to construct national highways and bridges from state to state is essential to the complete control and regulation of interstate commerce."

The conjunction is the disjunctive "*or*," not "*and*." It is not said that the power to do *both* these things, *i. e.*, to itself construct *and* to authorize others to construct railroads is essential to the "complete control and regulation of interstate commerce," but that the power to do one or the other of these things is essential, &c.

If Congress has no power under the commerce clause to do one or the other of these things, it is plain it could have no voice at all in the matter of building interstate railroads.

> "Without authority in Congress, to establish and maintain such highways, it would be without authority to *regulate* one of the most important adjuncts of commerce."

This does not mean that the authority was in Congress, to itself build such highways, but to "establish and maintain" them in the manner in which they were established and maintained in the case then under discussion, that is, by doing the latter of the two alternatives above stated to be essential, viz.: to authorize individuals or private corporations to construct and maintain such ways. To "establish and maintain" no more means by the direct action of the government than the term "creation of the vast system" used a little later. The system of railroads to the Pacific was "created" by Congress in the same sense as that in which the terms to "establish and maintain" railroads "are used in the statement that it is essential to" *regulate* "one of the most important adjuncts of commerce."

The reference to the Cumberland road, it may be admitted, tends to show the court may not have been keeping in mind clearly the distinction between building the road and prescribing the conditions upon which others should build it, but that is the limit of what can be inferred from it.

The opinion then recites that in former times many of our statesmen doubted the power to establish ways by land.

But that doubt to which reference was made applied to the whole power to regulate land transportation not merely as to the power to build roads. "The Daniel Ball," 10 Wall., 557.

The Supreme Court refrained in the case just cited from giving an opinion as to the power of Congress to regulate (the matter then in question, being a mere regulation) interstate transportation by railroads. Then follows the statement which is the only statement of the power of Congress in this respect in the opinion, except the power to "pass these laws."

> "But since in consequence of the expansion of the country the multiplication of its products and the introduction of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

Plenary power over what subject? Clearly the subject just referred to, "land transportation," including the construction of interstate railroads. In other words, the power to regulate interstate commerce includes the regulation of interstate transportation by land as well as water, and the construction of interstate railroads.

> "But the wider power was very freely exercised and much to the general satisfaction in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories and employing the agencies of state as well as federal corporations."

But the "wider power" here referred to which was exercised in the "creation" (as broad a word as "construct,"

or "establish and maintain"), of the Pacific Road system was the power to prescribe the conditions under which private corporations should construct these roads and not an assumed power of Congress to itself construct and operate them.

This opinion should be read and construed in connection with the facts, and the question involved, and an intention to express an opinion on a question not involved should not be inferred unless unavoidable.

It is submitted that the fair reading of that opinion is that the court meant to decide the case in hand and nothing else. But the court has itself defined what was meant by their opinion, viz.:

> "That Congress has authority in the exercise of its power to regulate commerce among the several states to *authorize corporations to construct railroads across the states* as well as the territories of the United States."
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> *Luxton* v. *N. R. B. Co.*, 153 U. S., Sec. 533.

That ought to be enough.

Though there is also an incidental remark in this case that Congress can act directly or through a corporation.

This however is within the rule in *Cohens* v. *Va.*, but is all in any of these opinions for which the doctrine of that case is necessary.

The doctrine of *Gibbons* v. *Ogden*, that the power to regulate commerce is the power to prescribe the rule according to which it shall be carried on can not be overruled by doubtful *dicta* especially as it has been enforced and reaffirmed in later cases.

But does any one claim Congress has power to itself do what The Pacific Railroad Companies are doing, and that such power results from the fact that it has

power to authorize those corporations to do these things, that is to prescribe the conditions under which they shall carry on their commerce or rather so much of their commerce as is interstate. These cases so far as they are decision not dictum are submitted as establishing a principle wholly inconsistent with the assumed power to itself construct those roads, viz., the power to authorize corporations to construct them, in other words, that it is carrying on, not regulating commerce.

But it is plain Congress cannot authorize corporations to regulate commerce.

Two things are to be done, with reference to interstate commerce, first to regulate it, second to carry it on. One is done by Congress, the other by the citizen. Neither can act in the field of the other. If the thing proposed to be done is to regulate commerce, Congress alone can do it, and cannot authorize the individual or private corporation to do it.

If on the other hand, what is proposed to be done is to carry on commerce, the individual can be authorized to do that thing according to such conditions or rules as Congress may prescribe but Congress may not itself do that thing.

If building or buying and operating a railroad or canal for interstate commerce, is regulating commerce, no individual or private corporation can be authorized by Congress or by any state legislature to build it, because Congress cannot delegate to individuals or private corporations the power to regulate commerce.

But if building or buying and operating a railroad or canal for interstate commerce, is carrying on commerce, as it plainly is and has been repeatedly adjudged, then an individual or pri-

vate corporation can be authorized to build and operate it in such manner and upon such terms and conditions, in other words according to such rule, as Congress may prescribe; but Congress may not itself build and operate such roads and canals because its sole authority is to regulate them. What Congress can authorize another to do it cannot do itself, and what it can do itself it cannot authorize another to do. As was quoted above from *Gibbons* v. *Ogden.*

> "the state it is said or even a private citizen, may construct lighthouses, but gentlemen must be aware that if this proves a power in the state to regulate commerce, it proves that the same power is in the citizen. States or individuals who own land may if not forbidden by law, erect on those lands what buildings they please; *but this power is entirely distinct from that of regulating commerce.*"
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> *Gibbons* v. *Ogden,* 9 Wheaton, p. 208, 209.

So here, if the construction and operation of this canal is regulating commerce,' then the new Panama Canal Company has been for some time regulating our commerce, and unless it is regulating commerce, Congress has no authority to build it under this power.

The decision then that the things then under consideration were things Congress could authorize private corporations to do is a decision that they were such things as Congress was not authorized to do itself, in other words that those things constituted carrying on not regulating commerce.

But, however, much or little deference should be paid to the broad language quoted from those cases. it is clear it can have no application to cases arising outside the limits of the United States. The authority of Congress to regulate commerce in the United States on any theory,

cannot go beyond the limits of the United States, and of course the court in using the language it did use could have had no thought of its being quoted without that qualification.

But even if this canal and railroad were to be built and operated in the territories of the United States in which Congress has power to make needful rules and regulations, and in which Congress had in addition to the powers discussed, all the powers of a state government, it could still not be sustained. Carrying on commerce is not government at all. The only difference is that in the territories the list of the kinds of commerce as to which Congress may make needful rules and regulations is longer than in the states. This question has arisen in two states. The Minnesota Legislature passed an act to build a state elevator at Duluth. A bill was filed by a citizen to enjoin the public officers having charge of the public funds from applying them to that purpose. The act was attempted to be defended under the police power to regulate all business affected with a public interest. It was answered that the state under the police power to regulate had no right to carry on the business. There were some further objections under the special wording of the Minnesota Constitution; but the case was decided on general principles; the court said, at page 511:

> "The position of defendant's counsel really amounts to this: That whenever those who are engaged in any business which is affected with a public interest, and hence the subject of governmental regulation, do not furnish the proper and reasonable service, the state may, as a means of regulating the business, itself engage in it, and furnish the public better service at reasonable rates, or by means of such state competition, compel others to do so. The very statement of the proposition is sufficient to show to

> what startling results it necessarily leads. * * *
>
> Railways are also under this same police power, the subjects of state regulation, and if it should be deemed they were not furnishing the public with proper service, or charging unreasonable rates, it could with equal propriety be claimed that to be a proper means of exercising the police power of regulating the business for the state itself to construct and operate competing railroads.
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> * * * * * * *
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> But further illustration cannot be necessary. The police power of a state *to regulate a business does not include the power to engage in carrying it on.* Police regulation is to be affected by restraints upon a business, and the adoption of rules and regulations as to the manner in which it shall be conducted. * * * The provisions of this act have no reference to the regulation in any such sense of the grain elevator; and the right of the state to embark in the construction and operation of these works cannot be predicated under the police power." *Rippe* v. *Becker*, 56 Minn., 100.

In the case of *State* v. *Aiken*, 42 S. C., 222, the validity of an act of the Legislature of South Carolina providing for the state to run the liquor saloons of the state was involved. The court sustained the legislation, but on page 248, cites the case of *Rippe* v. *Becker* above cited from the Supreme Court of Minnesota, and approves it, but makes a distinction between that case and the traffic in intoxicating liquors, which the court holds to be dangerous *per se*, and which the state may therefore take hold of and operate. The authority of this case in favor of the direct operation of the saloon business is weakened by the circumstances under which it was rendered. The court consists of three members. The same act was presented to the same court and held invalid, on substantially the same grounds as *Rippe* v. *Becker*, the court standing two members against the act to one in favor of it.

Then one of the judges, who had held it bad, went out of office. His place was filled by a new man chosen by the legislature, anxious to have the act sustained. It was then sustained by a vote of two to one, overruling the former decision; but fully concurring with the Minnesota case, except as to the liquor business. That case is therefore an authority directly against any claim of power on the part of Congress exercising in the territories the authority of a state to build and operate railroads or canals. A railroad or canal has *per se* no possible tendency to create disorder or spread disease; consequently does not come within any classification with the liquor business.

To the same effect is *The State* v. *Kelley*, 81 Pac., 450, recently decided by the Supreme Court of Kansas, holding the state not competent to carry on the business of refining oil.

The actual transaction, the validity of which is the subject of this inquiry, is to build a plant (a canal and railroad) with which the United States will directly on its own account, for profit, carry on the internal commerce of a foreign nation.

The power to do this is not a necessary implication from the power "to regulate commerce among the several states with foreign nations and the Indian tribes."

But if the power is not in this clause it is nowhere. This is commerce not only plainly commerce but so declared authoritatively, not the commerce of the United States which was in former times the only commerce anybody claimed the right to use the public funds to promote but "the World's Commerce" but commerce and nothing but commerce, and the whole power of Congress in commercial matters is in this clause.

It was plainly the purpose by each grant to cover all

the power given in the entire field covered by that grant.

Thus: The levying of taxes on imports is the commonest and perhaps the most effective of commercial regulations.

But no power is given Congress by the Commerce Clause, to regulate commerce in this way, because the whole power intended to be given in that field is in the taxing clause.

Gibbons v. *Ogden*, 9 Wheaton, p. 201.

Transportation Co. v. *Wheeling*, 99 U. S., p. 273.

In upholding as a war measure, a bill authorizing the President to require a license for the privilege of trading with the public enemy, the court carefully distinguished this fee, for a special war privilege from a tax, as a tax could not be collected under the war power, the whole power in the field of taxation being in the first clause.

Hamilton v. *Dillen*, 21 Wall., 73.

Again, the whole power of the Federal Government to try and punish persons charged with crime against the Federal Government, is in the provision establishing courts and defining their jurisdiction. Therefore the war power did not extend to that field.

Ex parte Milligan, 71 U. S., 2.

But if the charges against Milligan were well founded, he was a much more dangerous enemy than if in the enemy's camp and the military method was much more prompt than the constitutional one.

The same was ruled in *Ex parte Vallandigham*, 1 Wall., 243.

So the commerce clause gave to Congress all the authority it was designed Congress should have in the entire field of commerce, and nothing can be done in that field under any other power.

All this does not involve any denial of the validity

of land grants to railroad companies, or of the river and harbor improvement acts.

Congress has express authority to dispose of, not merely to sell, the territory of the United States. To grant a portion of the lands in consideration of the building of a railroad that will leave the remainder still held of greater value than the whole was without the improvement, is only to make such a disposition of the land granted as any prudent owner would make under like circumstances. This is also sufficient for the Cumberland Road legislation.

Special considerations in no wise applicable to the questions here involved, govern the appropriations for removing obstructions in and the improvement of the navigable waters of the United States. In all countries, the navigable waters are the public property of the nation in whose territory they are located. This has always been the law here. To the major portion of the public rights held by Great Britain, the several states have succeeded, but as to this easement of navigation in the natural water courses forming continuous highways of commerce between two or more states, or between states and foreign countries, and over which the commerce which by the constitution has been given over to the control of Congress is conducted, it is the established doctrine that the United States has succeeded and that it is the property of the United States.

Gilman v. *Philadelphia,* 3 Wall, 713.

The removal of obstructions from and the improvement of such natural water courses are merely caring for the property of the United States; and to be defended on substantially the same grounds as those which justify putting a roof on the capitol, although not themselves

regulations of commerce. As held in *Gibbons* v. *Ogden,* cited above. "This power is entirely distinct from that of regulating commerce."

An occasional expression may be found in cases not involving the question, when this distinction is not apparently borne in mind but it clearly exists.

These considerations have no application to artificial ways, either land or water. They, like all other structures, belong to the people who make them. There is a clear distinction between the unlimited control and ownership of the navigable waters of the United States and the limited control over railroads engaged in interstate commerce held by Congress. In the one case, Congress acts as owner, taking care of its property, and as a sovereign regulating commerce carried on in such waters; in the other only as a sovereign regulating commerce. Congress as a sovereign may prescribe the rule according to which goods and persons shall be transported from state to state over the Hudson River or on the railroads on either bank; but the railroads are private property, and the doing of such things on the railroad for its improvement as are done in the river for its improvement, is by and subject to the authority of the board of directors. In the river Congress is both Congress and the board of directors. The improvement it should be noted is always in the particular line for which it is held in trust, *i. e.,* its navigability.

In the case of navigable waters, as the owner, the United States may authorize others to do what it may do directly in the improvement or care of this property. Thus the states, with either the express or tacit assent of Congress may dredge and otherwise improve harbors in navigable waters.

Mobile Co. v. *Kimball,* 102 U. S., 691.

Congress may even authorize private persons to erect structures in the navigable waters, but not on the right of way of railroad companies.

Wheeling Bridge Co. v. *Pennsylvania,* 18 How., 421.

But it is plain that Congress cannot authorize the state or individuals to regulate commerce.

But this practice of caring for the public natural waterways is not attacked here. The distinction between them and artificial land or waterways has from the beginning been recognized. At one time the power of Congress to *regulate* land transportation was denied, though that power has since been affirmed in the Pacific Railroad cases. The reason why it should ever have been doubted is not apparent. But even when the right to make artificial roads was most vigorously contested, lighthouses continued to be built and the improvements in the navigable waters made, without any question as to the authority of Congress. But the practice as it has obtained would furnish no precedent for what is attempted here. It is the navigable waters, and not all navigable waters, but only the navigable waters of the United States, as defined in *Gilman* v. *Philadelphia,* 3 Wallace, 713, that is, such as form a continuous highway of commerce with other states that are the public property of the United States, and which Congress has assumed authority to take care of. Even a river located in a state not forming a continuous highway of commerce is not within the rule. *Veazie* v. *Moor,* 14 Howard, 567, was an exact duplicate of *Gibbons* v. *Ogden,* except that the Penobscot River, where the matter in controversy took place, was entirely in Maine; hence, it was held Congress had

no authority. What Congress can't do in Maine it surely can't do in Panama.

If Congress had for a long series of years annually voted great sums to build docks at Liverpool, to dredge the harbor at Hamburg, to widen and deepen the channel of the Thames, the Rhine, the Danube, the Ganges and the Amazon, on some theory that some time some American might be traveling in those parts and wish to trade with the people, and find these improvements useful, and we were therefore regulating commerce with foreign nations, or that some time we might be at war with those people and our warships might find their movements facilitated, and we were therefore declaring war, or that by cultivating the good-will and gratitude of those people, we were diminishing the chances of war, and were therefore promoting the general welfare, a legislative precedent would exist for improving the harbors of Panama and Colon at the expense of the people of the United States, but still nothing for the construction of artificial land or waterways in Panama.

II.

The measure can derive no support from the power to establish postoffices and post-roads.

1. The objection to the claim that support for the measure could be derived from the commerce clause, *viz.*, that the business to which it relates is to be carried on, not regulated, does not apply. The postal business is to be carried on by the United States. Hence the term used is "establish," not "regulate." The use of the two different terms shows the intention to give power to do one thing as to interstate commerce and another thing as

to the business of carrying the mails. The United States may "regulate" the one and "carry on" the other. Here too, the Constitution is one of enumeration, not of definition, and the enumeration of the one kind of commerce that may be carried on excludes the kinds not enumerated.

Just as in *Gibbons* v. *Ogden* it was held that the enumeration in the commerce clause of the kinds of commerce that might be regulated excluded all other kinds, and no other kinds could be regulated. So here the enumeration in this clause of the kind of commerce that may be carried on excludes all the other kinds and no other kind can therefore be carried on.

2. The question much debated whether, with the power to establish postoffices and post-roads, it was intended to include the power to build them, or only to designate the routes to be taken and secure to the United States the power to protect the mails in transit, need not be discussed. It is plain it was only designed to give the power to establish postoffices and post-roads, however much or little that means in the United States. Congress has no constitutional authority to establish postoffices or post-roads in England or Panama, or use the public funds for that purpose.

3. It is not even attempted by this statute to establish this canal as a post-road. The general statute makes all canals post-roads while the mail is carried on them. But that, of course, means all canals in the United States. No attempt is made to establish this as a post-road, and if it were, it would be manifestly "a covert attempt to legislate upon another subject under the appearance of legislating on this one," and, therefore, void, or a case for this rule:

> "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."
>
> *McCullough* v. *Maryland*, 4 Wheat., 316, p. 423.

It is safe to say that not a pound of mail between New York and San Francisco would be carried over this slow route in a year, and the above characterization would be fully justified.

This canal is to be built, if at all, not to carry our mail, but as a kind of quixotic gift to the whole world, as its own sponsors give it out.

It is only fair to say that the authors and supporters of this measure have not been guilty of false pretenses of this character. It has not been claimed that this canal is to be built at an expense of from two to five, six or ten hundred million dollars and maintained at an annual charge of from two to five millions, for the purpose of carrying twelve dollars' worth of mail, that is already better provided for. But it is distinctly and authoritatively avowed to be a purely commercial project for the benefit of the whole world. If, however, it should be so argued, it would be replied that, while it is the rule as to all corporations authorized to carry on a principal business, that principal business would include authority to carry on a mere incident, the incident would not give authority to carry on the main business. A railroad, for example, may establish eating-houses for the convenience of its passengers, but an eating-house company could not build and operate a railroad as an incident to the eating-

house, and at the suit of any stockholder the use of the eating-house company's funds for that purpose would be enjoined.

Jacksonville, etc., R. R. Co. v. *Hooper*, 160 U. S., 514. In that case the court said:

> "In the application of doctrine, the court must be influenced somewhat by the special circumstances of the case. As was said by Romilly, M. R., in *Lyde* v. *Eastern Bengal Ry.*, 36 Beav., 10, there was in question the validity of the contract by a railway company to work a coal mine.
>
> "The answer to this appears to me to depend on the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental profit of selling coal to others; but if the principal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company, and a scheme that ought not to be permitted, however profitable it might appear to be. * * *
>
> "Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purpose for which its charter is granted; but it may also engage in transactions which are incidental or auxiliary."
>
> *Jacksonville, etc.*, v. *Hooper, supra.*

But this discussion can safely be deferred until a case presenting the question arises.

When the "world's commerce" theory is dropped and the canal is labeled a post-road, the effect of such a "covert attempt to legislate on world's commerce under the appearance of legislating on postoffices" can be taken up.

III.

The measure can derive no support from the power to declare war.

This as construed in *McCullough* v. *Md.* 4 Wheaton, 407, and *Miller* v. *United States,* 11 Wallace, 268, means the power to declare and carry on war. That means, of course, the whole power of the United States —both the power of the President and Congress.

The power is to carry on war, not to carry on commerce. This is commerce; transportation is commerce.

Gibbons v. *Ogden,* 9 Wheaton, 1.

Joint Traffic Assn. v. *U. S.,* 171 U. S., 515.

And this is a transportation project. But the whole power of Congress in the field of commerce is to regulate a limited number of kinds of commerce, not to carry on anything; and is, whether much or little, in an entirely different clause.

As already argued, no authority can be implied from one power to do anything in the field occupied by another.

No power in the field of taxation can be implied from the commerce or war powers; all the authority intended to be given in the field of taxation is in the taxing clause.

Gibbons v. *Ogden,* 9 Wheaton, 201.

Transportation Company v. *Wheeling,* 99 U. S., 273.

Hamilton v. *Dillon,* 21 Wallace, 73.

The first two are commerce cases and the last a war

case. So, nothing in the judicial field can be implied from the war power.

Ex parte Milligan, 71 U. S., 2.
Ex parte Valandigham, 1 Wallace, 243.

So the whole power in the field of commerce is in the commerce clause, and nothing in that field can be implied from the war power.

It is usual, when authority is sought, to sustain any doubtful or extra-constitutional measure for which no warrant can be found elsewhere, to claim justification under the power to declare war. It is argued, as if the Constitution contained in the enumeration of powers, some such statement as Congress shall have the "war power;" that this "war power" includes or implies power not only to declare and carry on war but the further power in time of peace to prepare for war; that therefore Congress may do whatever it may deem requisite, or which may have a tendency to insure that the military needs in the event of war will be supplied; that inasmuch as an army, being composed of men, has need of practically everything that men require in time of peace, therefore Congress may under this power take charge of the production and traffic in substantially everything. This kind of reasoning is plainly not admissible; it converts the war power into the exact equivalent of the power to promote the general welfare. It is the plainest example of "that enlarged construction which would extend words beyond their natural and obvious import," referred to and condemned in *Gibbons* v. *Ogden*, 9 Wheaton, 188.

But there is no such general grant of the "war power." It is, of course, manifest that the United States is to carry on war; but no such power as above described is

given for that purpose. The authority of Congress in the matter is contained in the 11th, 12th, 13th, 14th, 15th and 16th and part of the 17th subdivisions of Sec. 8, Art. I. The clause relied on provides that Congress shall have power to declare war. This has been held to include the power to declare and carry on war, "to declare and conduct a war," *McCullough* v. *Maryland*, 4 Wheaton, 407, "to prosecute it by all legitimate means," *Miller* v. *N. S.*, 11 Wall., 268, though that, of course, means the whole power of the United States.

But taking the language quoted from *Miller* v. *U. S.* and *McCullough* v. *Maryland* as accurate—and, of course, it is, so far as that or this case is concerned—and the real meaning of the authority intended to be granted by this power to declare war to be, the power to declare war and to conduct it or carry it on, to prosecute it by all legitimate means, etc., it would still give no basis for anything done in time of peace, except the mere inauguration of hostilities. It would comprehend the power to select means as in exerting any other power, but whatever is done must be such a thing as, being done, is carrying on war. The reasoning as to included power is applicable here. The Constitution in this clause, as well as the commerce clause, is one of enumeration and not of definition; consequently, as it was necessary in ascertaining the meaning of the commerce clause to define commerce, and its meaning being ascertained, to be broad enough to include navigation, it was held that, therefore, Congress had power to regulate navigation because it was part of commerce, and the meaning of the term not being broad enough to include production, therefore production could not be regulated, so here, in as-

certaining what may be declared and carried on, we must inquire, what is war? And if the thing proposed to be done is carrying on war, it may be done; if not, it cannot be done under this clause. Thus the act under consideration in *Miller* v. *The U. S., supra*, providing for the confiscation of the enemy's goods in time of war, was sustained because that is carrying on war. The power to declare and carry on war implies no power to do anything else. No definition of war can be broad enough to include building a commercial canal in a foreign country in time of peace.

The real nature of this affair is authoritatively set out in an address by the former Secretary of War, delivered at Chicago on February 22, 1904. He said: "We will dig the canal, not for selfish reasons, not for greed of gain, but for the world's commerce, benefiting Colombia most of all. We shall not get back the money we spend on the canal any more than we shall get back the money we have expended to make Cuba a free and independent republic."

Magnificent, no doubt, and very kind, but surely not war.

As was said in *Knight Co.* v. *U. S.*, 156 U. S., 1: "Production precedes commerce and is not part of it," hence cannot be regulated under the commerce clause.

So preparation, especially such very benevolent preparation, precedes war, and is not part of it; hence cannot be carried on under the war power.

But again, the power to declare war should not be construed as including the power to build this canal in time of peace, because the extent of the authority of Congress to in time of peace prepare for war is set out in five dis-

tinct substantive grants, which are entirely superfluous if the power to declare war is to be understood as including a power to do or make all things in time of peace which might prove useful in time of war. If the power is as broad as is necessary to include authority for this measure, manifestly there was no occasion to insert the 12th, 13th, 14th, 15th and 16th clauses. It is everywhere conceded that the argument is sound that the clause as to providing for the general welfare cannot extend the powers of Congress beyond those enumerated, because it would include them all, and much more, and it cannot be supposed that in making this careful enumeration of powers, nothing at all was meant. The enumeration excludes things not enumerated. The same reasoning holds good here. If the convention that framed and the people that adopted the Constitution, by this grant of power to declare war meant to include a general power in time of peace to prepare for war, broad enough for the present purpose, it is hard to see why it was thought necessary to specifically provide for power to raise and support armies, to provide and maintain a navy. This reasoning has been adopted by the Supreme Court:

> "Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. It would be restraining this clause within narrower limits than the terms themselves import, to say that the power to make rules concerning captures on land and water, is to be confined to captures which are extra-territorial; if it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress *of the power in question not included in that of declaring war.*"
>
> *Brown* v. *U. S.*, 8 Cranch, 116, p. 125.

This is not dictum, but decision; the question involved in that case was whether the declaration of war against Great Britain, made of itself the property of British subjects found in the United States liable to capture and seizure. The court held it did not; that the declaration of war was not enough, because the power thus exercised, namely, the power to declare war, was not to be construed so broadly as to cover anything included in another substantive power. This case is submitted as entirely decisive against any claim of authority for this measure under this power.

It is submitted the power to build and operate this foreign canal out of the United States Treasury is not included or comprehended in the power to declare war; that Congress in building and operating this canal and railroad is not declaring or carrying on war.

But again, it is clear, as already argued, that one power can imply no power to act in the field covered by another power. This enterprise is manifestly commerce; transportation is commerce.

Gibbons v. *Ogden, supra.*

And this is a transportation project. But, as already pointed out, the full measure of the authority in the field of commerce intended to be given, is in the power to regulate commerce among the several states and with foreign nations and the Indian tribes. This enumeration excludes Congress from any further control over any commerce than regulation; and from any control of any kind over any other kind of commerce; but if the power to declare and carry on war is broad enough to include the power to build and operate transportation lines, because they may be useful in possible future military ope-

rations, that leads to the conclusion that under this power Congress may take up and directly carry on and control and operate the entire transportation system of the country. The careful limitations in federal legislation, confining the interference of Congress with transportation lines to interstate commerce, is superfluous. In carrying on war, it is necessary to move troops and munitions not only across state lines but from one part of the state to another part of the same state. Especially, but not exclusively, in suppressing domestic insurrection, it is often necessary to move troops from one part of a city to another. This has occurred in several instances in Chicago and elsewhere. If, then, the fact of a possible future necessity to move warships from the Atlantic to the Pacific Ocean is sufficient justification for building a commercial canal across the Isthmus of Panama in time of peace, it is not seen why the same and a very much more probable necessity of moving troops from one part of the city to another does not justify the United States in constructing a street railway line in any city in the country, and operating it in time of peace, for profit, till the military necessity arises. But this is manifestly commerce, and not such commerce as the Constitution committed to congressional control.

But even if it be conceded that the power to declare war includes the power to prepare for war, and the power to prepare for war includes the power to in time of peace put the country into condition to successfully and advantageously carry on war, it could certainly not include the power to prepare the whole world for war. There is no corner of the earth with the sovereign of which we may not at some time go to war, and which we might not have occasion to invade. Under these cir-

cumstances, it might be found very convenient and greatly facilitate the invasion if the country invaded were well supplied with transportation facilities, especially under control of the invader. Not long ago the United States had occasion to send the army to the capital of China, on a mission of great national importance, the rescue of our Minister from personal danger. If a modern railroad had at that time been in operation, owned and controlled by the United States, from the coast to Pekin, it would have been a great military advantage. Does it follow that Congress, having power to declare war, is as a part of that power authorized in time of peace to levy taxes and borrow money on the credit of the United States to build and operate such a road as a commercial venture, because that same military necessity may arise again? If not in China, why in Panama?

If it is said that this work differs from others because it would be on the line of way from one part of our own country to another, the same may be said of any canal or railroad, both ends of which are on the seaboard or can be reached from the seaboard. The world is round. Besides, in war there is a military "necessity" for the army and navy to go everywhere. There is no plainer military necessity to reach home than to reach the home of the enemy. War was carried on recently by the United States in Asia. Anything that would have helped send ships or supplies to Manila would have been, and would be, quite as clearly within the war power as providing means to move the Oregon from San Francisco to Cuba.

If it be said that Panama is nearer home and transit more likely to be required there, that would be a difference of degree only, and not of kind. If this power to declare war includes the power to make at public ex-

pense and operate commercial improvements of this character in foreign countries, because of the possibility that in some possible contingency the War or Navy Department might be among its customers, then the degree of that necessity is for Congress, and there is no limit to such expenditures except the discretion of Congress.

In England that is thought sufficient; but it is not the theory of our government.

It is submitted this is not within the natural and obvious import of the language that Congress shall have power to declare war. If the power to carry on war includes the power to carry on the business of transportation commercially because military emergencies may arise in which the existence of such facilities are useful, so, clearly, under the same power, Congress would have authority in the same way to set up and carry on a postoffice establishment which in the same way and to as great an extent would be useful in like military emergencies. But it was thought necessary to give by a definite substantive grant the power to carry on the postal business, but no such grant is given of power to carry on the transportation business. The inference is irresistible that the enumeration of this one kind of commerce which Congress is expressly empowered to carry on excludes the right to carry on any other, whether as incidental to any other power or not. Just as the enumeration of the special kinds of commerce Congress is empowered to regulate excludes all commerce not enumerated, and Congress may not, therefore, regulate the other kinds. But if the war power authorizes Congress to establish and carry on any business which may include the War or Navy Department among its customers, which is the substance of the argument, it does not

stop here. Transportation is necessary for an army. It is quite as necessary that the army should be fed and clothed as that it should be moved; therefore, Congress may establish slaughter-houses and clothing factories and stores, and operate them in time of peace for general profit, in order that the army, should the occasion arise, may have a convenient means of supplying its wants. Not only this, but it is held that when the United States is authorized to carry on a branch of commerce, namely, the postoffice business, it has also authority to secure to itself a monopoly of that business.

Blackham v. *Gresham*, 16 Fed. Rep., 609.
U. S. v. *Easson*, 18 Fed. Rep., 590.
9 Opinions Atty. Gen., 161.
21 Opinions Atty. Gen., 394.

In other words, under the power to declare war, so construed, Congress is authorized to completely monopolize practically every branch of commerce, both interstate and local, both regulate and carry it on. In fact by odds the greater part of the constitution could be dispensed with and ample powers found for the legislation they authorize if Congress had only been authorized to declare war if this is its proper construction. This can be properly described as "that enlarged construction which would extend words beyond their natural and obvious import."

Gibbons v. *Ogden*, 9 Wheat., 188.

It should always be remembered that the Constitution was adopted by the people; that refined, technical and artificial constructions are not permissible. No rule in Shelley's case, the object of which is to ascertain what the person using the language meant, and then give it

a different effect, can be allowed. Words are to be given their "natural and obvious import." This power to declare war was adopted as a matter of course, without opposition, either in the convention or before the people. If its "natural and obvious import" is taken as measuring its limitation, there is no room for two opinions about it. Of course, that authority should be lodged somewhere in the Federal Government. But if it had been for a moment imagined that it was intended to include in these words so extensive a scope as is necessary to cover such a measure as this, there is very little probability it could have been adopted at all; certainly not without an active controversy both within and without the convention. Even the power to raise and support armies was vigorously contested before the people. All the old arguments about the dangers of standing armies, about the comparative merit of volunteer patriotic soldiers and machine soldiers; about how the farmers in the Revolutionary Army had been found efficient against the trained soldiers from abroad, etc., etc., were gone into at length and vehemently. Certainly the parties to this controversy did not understand that the power to declare war meant any more than to declare war. Certainly, if it did not include the power in time of peace to raise and support armies it did not include the power to build canals, especially in foreign countries, because at some time the army that had to be first raised, and the navy which had to be first provided, and which this power to declare war was not thought broad enough to authorize to be raised or provided, might find it convenient in some possible contingency. It is not denied that when carrying on war, the war-making authority may do anything that can fairly be included or comprehended in those terms. At

the risk of repetition as in *Gibbons* v. *Ogden,* it was reasoned, "the Constitution is one of enumeration, not of definition." Now, just as in measuring the extent of the power to regulate commerce, the court inquired, what is commerce? And finding that commerce included navigation, decided that therefore navigation might be regulated, and that commerce did not include manufacture; and therefore manufacture might not be regulated. So here, in measuring the extent of the power to carry on war, we should inquire what the term "war" means; and unless the thing sought to be done under this power is war, it is not included or comprehended. "Production precedes commerce and is not part of it," hence cannot be regulated under commerce clause. (*Knight Co.* v. *U. S.*, 156 U. S., 1.) So such "preparation" as this precedes war and is not part of it, and cannot be carried on under the war power. Many things done in time of war, and as war measures, can be justified under this power, which, in time of peace, cannot be. Thus, an embargo in time of peace would have to be justified under the power to regulate commerce, and could have no support from the war power, because in time of peace war is not carried on; but the same thing done in time of war is sustained under the war power, because then it is carrying on war.

> "That it" (an embargo) "may be, and often is, used as an instrument of war cannot be denied; an embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these and similar cases, it is a military instrument, and partakes of the nature of war; but all embargoes are not of this description; they are sometimes resorted to without a view to war, and with a sin-

> gle view to commerce. In such case, an embargo is no more a war measure than a merchantman is a ship of war; because both are vessels which navigate the ocean with sails and seamen."
>
> *Gibbons* v. *Ogden*, 9 Wheaton, page 192.

So, when invading a foreign country, the President may make roads in that foreign country to march and carry supplies over, because that is war; but a commercial road made in the same place in time of peace would have to find support in some other part of the Constitution, because then it is not carrying on war.

This does not involve the conclusion that the people in making the Constitution intended to provide a power to make war, and yet not furnish the means to make war effectively. It was understood that armies must be fed, clothed, armed and transported; and for that purpose that it was necessary that farms should be cultivated, that mines should be worked, that factories should be operated, and transportation lines opened. But the infirmity of the argument is that it omits this consideration. They did not depend on Congress for everything; they did not believe that nothing would be done if Congress did not have charge of it; they depended on themselves, the people, for nearly everything. The people were expected, on their own motion, in their own way, to develop the country and make it strong and dangerous to enemies. Congress was authorized at any time to declare war, and was then expected to make provision for the President to carry it on out of the resources of the country, as the people themselves had made them. It was distinctly understood that the government then being established was far from ideal, judged from a mere soldier's standpoint; that the system of imposing limita-

tions on the power of the governors impaired the military strength; that if war was the only thing to be considered, a pure despotism was altogether the best system of government. But fully recognizing this, they chose to take the chances, they compared the good and evil of both systems, and deliberately chose to risk the theoretical danger to the common defense from the possibility that they might at some time find themselves in a war with inadequate preparation, rather than what they regarded as the much greater risk to the general welfare involved in turning over to the Federal authorities such plenary control over their persons and estates as might insure the bringing out of their greatest possible military strength. The time had gone by when war was counted the chief end of man. It was understood that war was sometimes not to be avoided; and after Congress had deliberated on the matter, and determined war was necessary, the full power to carry it on was given, with full command of all the resources of the country; but in the meantime, until after such declaration, the authority of the Federal Government is measured by the other enumerated powers.

With exactly the same propriety the authority could be referred to the power to constitute courts inferior to the Supreme Court.

Transportation facilities are quite as necessary, though not in the same degree, to carry into execution this power, as any other. The judges, parties and witnesses must reach the places where the courts are held. The justice assigned to the Ninth Circuit must travel from Washington to San Francisco. He might, if this canal were finished, go to New York and sail by steamer, going through this canal; and there is quite as much probability

that he would travel by that roundabout route as that any portion of the United States mails would go that way. But the power to constitute these courts only gives power to constitute the courts and define their jurisdiction, and provide for the sessions, etc. But I have nowhere seen it claimed that it includes the power to build and operate railroads, because judges, jurors, parties and witnesses might be at times among the list of passengers. But if the power to carry on the administration of justice does not include the power to engage in commerce, without which it is impractical for the courts to hold their sessions, neither does the power to carry on war or the postal business include anything more than the power to carry on war or the postal business.

IV.

The measure can derive no support from the provision that "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

At the hearing below any claim that authority for this legislation could be based upon this clause was waived by counsel for the appellee. It is manifestly inapplicable to the facts and legislation now under consideration, even if the strained construction at one time claimed for it in some quarters were allowed. Yet, as it is, the clause that has figured more extensively than any other in the discussions of the formerly claimed power to make internal improvements, and has had the support of some great names, and is the only clause relied on for anything done or attempted since May 4, 1822 (except, of course, the

making of common public roads in the territories), and as it has in times past been attempted to be stretched to meet situations equally irrelevant, it has been thought the views of appellant on this subject should be submitted, and if counsel for appellee remain of the same mind as at the hearing below, this discussion can be passed over.

The Pacific Railroad legislation was not referred to this clause, but to the commerce clause, with an incidental reference to postoffice and war objects. But upon any more limited construction of this clause than the wholly inadmissible one that the general welfare expression gives to Congress a general power to enact such laws as it might deem promotive of the general welfare, it is impossible to derive any support for either the Pacific Railroad legislation, which, so far as it gave any financial assistance to those enterprises, provided not for the levy of taxes and the application of the proceeds but for a pledge of the public credit; or for the present act, which also provides in the main for raising funds for the enterprise by borrowing money in addition to comparatively small appropriations from the general fund in the treasury shown by the bill to be made up not merely of the proceeds of taxation but of the proceeds of the sale of public land, money borrowed and money derived from all other sources. (Rec., page .) The act being further not a mere act to appropriate the proceeds of taxation to the general welfare, but an appropriation to carry out a measure of the United States Government, in which event it is believed not to have been at any time controverted that the measure in question must be authorized by some provision of the Constitution.

However, it is not to be denied that some men with names that cannot be regarded lightly in any discussion

of the meaning of the Constitution have contended for a degree of license in appropriating the public money, for which authority is claimed under this clause, that in this respect substantially does away with the whole doctrine that the United States Government is one of limited powers. The practice died years ago and was not attempted to be revived in the Pacific Railroad days, though whether the experience of other days will be repeated, and in order to sustain legislation for which no trace of authority can be found elsewhere, the claim will be made that this general welfare expression is a sort of residuary bequest of all powers not otherwise granted, remains to be seen.

This is the clause upon which in the main reliance was placed by the advocates of the rights claimed as to internal improvements; other clauses—commerce, postoffice and war—were by different persons cited in justification of the right claimed; but the construction of these clauses required such obvious "straining" of their meaning beyond their "natural and obvious import" that, generally speaking, the best informed advocates of the theory recognized them as plainly insufficient for the purpose, and adopted a broad, loose construction of this clause, largely justifying it on the ground that otherwise the remaining clauses would be "strained" to meet the necessities as they might arise. This is put with refreshing frankness.

> "By giving a reasonable extent to the money power it exempted us from the necessity of giving a strained and forced construction to the other enumerated powers." (Calhoun speech on the bill to establish the bank bonus as a public improvement fund.)
>
> Annals of Congress, 14th Congress, 2d Session, 1816-1817, pp. 855-856.

In other words, if legislators wanted to do anything the Constitution as written did not allow, they would force an unnatural construction upon some clause, to make it cover the case; and it would be better to use this clause as a kind of safety-valve, and preserve the appearance of obedience. It is not clear, however, why it is less harmful to "strain" this clause than any other. To "strain" the Constitution is to disobey it. The inquiry should be, as to this clause as well as all the others: What is the "natural and obvious import" of the language used?

Several different constructions were placed on these apparently harmless words: "To pay the debts and provide for the common defense and general welfare," in the taxing clause:

1. As an independent grant of power to Congress entirely distinct from the taxing power.

(a) To pay the debts.

(b) To provide for the common defense.

(c) To provide for the general welfare.

That this meant to give Congress power to promote the general welfare generally, not merely by the exercise of the enumerated powers.

This construction was so plainly counter to the accepted theory that the government was one of enumerated powers only, the power to promote the general welfare including them all and making the enumeration manifestly senseless, that it has had few defenders at any time, and need not now be considered.

2. That these terms, "to pay the debts and provide for the common defense and general welfare," were introduced as a qualification of the taxing grant.

This practically everybody agrees to. Judge STORY says it should be read as "Congress shall have power to levy taxes, etc., in order to pay the debts," etc.

Story on the Constitution, Sec. 908.

But different conclusions have been drawn from this.

A. That these are mere general terms indicating an outline of the ends sought to be accomplished by this grant of the power of taxation, and add nothing to the power of Congress in any way, but expressing in abundant caution what would have been implied without them, limiting the power already granted instead of granting further power. This position is best expressed in the language of the resolutions adopted by the Legislature of Virginia on the report of Mr. MADISON:

> "Congress is authorized to provide money for the common defense and general welfare; in both is subjoined to this authority an enumeration of the cases to which their power shall extend. Money cannot be applied to the general welfare otherwise than by an application of it to some particular measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, the question arises whether the particular measure be within the enumerated authorities vested in the Congress; if it be, the money requisite for it may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with and is enforced by the clause in the Constitution which declares that no money shall be drawn from the treasury but on consequence of appropriations made by law. An appropriation of money to the general welfare would be rather a mockery than an observance of this constitutional injunction."

Resolutions of Virginia Legislature, January 8, 1800.

This sounds very like an axiom, and is everywhere conceded unless the addition of the words expressing the purposes of the grant are held to imply an additional grant of another great substantive power, namely, the power of appropriation, equally as important as the power of taxation, and as attempted to be construed, covering a vastly broader field than that reached by any other power.

Story on the Constitution, Sec. 919

B. That the power to levy taxes in order to pay the debts, provide for the common defense and general welfare of the United States, includes or implies a grant of authority to appropriate the proceeds to anything that in the judgment of Congress would promote the general welfare whether within or without the constitution, the power implied being to appropriate money to aid the improvements made by or under the authority of others, this being the theory that was acted on for a few years after the claim of direct authority to make improvements at public expense had been abandoned.

The reasoning is in substance.

(1) The Constitution cannot have intended that the money raised by taxation should stay there, but must have intended that the power to appropriate the money thus raised should be given.

(2) This power of appropriation is given nowhere else.

Therefore, it is given in these words:

And Congress may use the public money in any way they may think will promote the general welfare, without regard to constitutional limitation.

But it did not at all follow from the mere fact that Congress was authorized to levy taxes, either generally or for specific purposes, that it had the executive power to spend the money when raised. The fear expressed by

Mr. Monroe that, if this strained construction of these few words were not adopted, money once in the treasury would always have to stay there, is not well founded. If so, money borrowed cannot be appropriated at all, but once in the treasury vaults must stay there.

The power of Congress to make lawful appropriations does not depend on any such strained inferences.

It can certainly be conceded that it was intended that the money raised by taxation or by any other means for that matter should be drawn out for proper purposes, but that inference does not depend on these few words.

A distinct clause provides that no money shall be drawn from the treasury but in consequence of appropriations made by law.

No one but Congress has authority to make any law, and Congress has only authority to make laws under the enumerated powers and laws "necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

Hence it follows that money once in the treasury must stay there till drawn out in consequence of a law necessary and proper for carrying into execution some one of the enumerated powers of Congress, or some power by the Constitution vested in the Government of the United States, or some department or officer thereof.

First. The language is plain, and never would have been construed as anything but a grant of power to levy taxes to pay the expenses of running the government if confusion had not been argued into it by the determined search for a place where a power never intended to be given could be located.

The United States is authorized to do certain things in order to promote the general welfare, and is forbidden to do anything else for the same reason. The things required to be done cost money; money is provided for the United States, in order that the United States may promote the general welfare. How? By doing the things permitted or the things forbidden?

Second. It is everywhere admitted that if the words "to pay the debts and provide for the common defense and general welfare," had been omitted, the language would have meant just what has been indicated; that is, merely a power to raise money by taxation, and the only way the proceeds could be lawfully expended would be in carrying into execution the enumerated powers. The additional language "to pay the debts and provide for the common defense and general welfare," it is claimed entirely changes this and converts this clause into a grant to Congress not only of the power to levy taxes, but of the additional substantive power to appropriate money; and under that power to expend the proceeds not only for constitutional purposes, but for any and all purposes Congress may be of opinion would tend to promote the general welfare within or without the Constitution.

The argument is, that the power to tax, in order to promote the general welfare, includes or implies the power to apropriate the proceeds to the general welfare. That the grant of the power of appropriation is in these words, "To pay the debts, provide for the common defense and general welfare of the United States." This is denied. The importance of the question whether the grant of the power is in these words or elsewhere is this: that if this is the grant of power to appropriate, it is claimed to be without limit; whereas, if the grant is elsewhere, it is limited.

The powe to tax is one great substantive power. The power to appropriate money from he treasury is another great substantive power, entirely distinct from and equally as important as the power of taxation.

The inference is fair that somewhere in any government that has a revenue from any source, an authority exists to apply that revenue to the purposes for which it was raised, but this is not the same as nor part of nor dependent upon the power of taxation.

It is not essential that these two powers should exist in the same body, and either may exist without the other. In England the power to lay taxes was and is in Parliament. The power of appropriation, that is, the power of spending the money when raised, in the King.

Under the articles of confederation, the power of appropriation was given, but the power of taxation withheld.

In the Constitution, both powers are granted, but by distinct sections and subject to distinct conditions.

> "The Congress shall have power to lay and collect taxes, duties, imposts and excise."
>
> "Direct taxes shall be apportioned among the several states according to their respecitve numbers."

All duties, imposts and excises shall be uniform throughout the United States.

> "All bills for raising revenue shall originate in the House of Representatives."

If this is the power of appropriation, then that power is subject to all the restrictions upon this power of taxation because part of that power.

None of these provisions relates to the power of appropriation. Appropriation bills need not originate in the House of Representatives; need not provide for uniform

expenditures throughout the United States, nor be apportioned among the states according to their respective numbers, for the plain reason that appropriation bills are not tax bills, nor is the power of appropriation included in or part of the power to lay and collect taxes. As to appropriations distinct sections provide:

> "No money shall be drawn from the treasury, but in consequence of appropriations made by law."
>
> "No appropriations of money for that use (to raise and support armies) shall be for a longer time than two years."

Neither of these great powers is such a one as would be left to uncertain argumentative inference, nor one as to which any one was willing to give a loose rein; and neither in fact is so left.

The control of the public purse had for many years in England been the chief means of keeping the kings in order, but experience had demonstrated that the system there in vogue was not complete protection. When the King had the power to spend the money, once it came into the treasury, *i. e.*, the power of appropriation, Parliament had the choice of evils, either to keep the treasury empty and the necessary public expenses unprovided for, or to put money in the treasury and take the chances on the King's spending it in enriching offensive favorites or keeping up standing armies, and other means to oppress the people.

The present argument is, that this offensive power of arbitrary expenditures has not been destroyed, but only transferred to Congress.

In the Articles of Confederation the power of appropriation was not regarded as an unimportant power, to be inferred from the fact that a treasury was provided to be filled, and that it was probably intended that it should

be emptied by somebody; but both the means of raising revenue, such as were provided, and the authority to appropriate the revenue when raised were expressly given the one not including or implying the other. The United States in Congress assembled shall have authority:

> "To ascertain the necessary sums of money to be raised for the service of the United States," and
> "To appropriate and apply the same for defraying the public expenses." Article IX.

A grant of power to raise money in any way for the service of the United States was not thought to include the power to appropriate the money for the service of the United States when it was raised but it was thought necessary to add the express power to appropriate and apply the same.

Nor did the grant of the power of appropriation include the power of taxation. If it had many of the troubles of the revolutionary war would have disappeared. But the one inference is as strong as the other. Money would probably not be raised without provision being made to spend it.

Money can certainly not be spent without provision being made to raise it.

Again, as indicating the estimate of the importance of this power while in ordinary matters a majority ruled, yet as to a few of the great substantive powers, they were not allowed to be exercised except with the assent of nine states; among these were both the power to raise money, such as was given, and the power to appropriate it when raised, both being kept distinct:

> "The United States shall never engage in a war, nor enter into treaties, nor ascertain the sums necessary for the expenses and welfare of the United States, nor appropriate money, unless nine states assent to the same." Article IX.

The Committee of the States was authorized during the recess of Congress to exercise most of the powers of Congress, but as to these essential things, like engaging in war, ascertaining the sums and expenses necessary for the defense and welfare of the United States (the confederation means of raising revenue) and appropriating money that committee could not act. Article X.

It is clear that from the beginning these two great powers were not confused.

The purpose to grant to Congress the power to levy taxes (an efficient in place of an inefficient means of raising revenue) is no more plainly and expressly stated than the purpose to put an end to arbitrary expenditures, by giving to Congress in express terms not only the right, but the exclusive right, to make appropriations, and by restricting that right when exercised by Congress, within constitutional bounds.

No more notes to the Treasurer, "Pay cash, I know the object of this expense, Louis, Rex," should be issued by either President or Congress or any one else. Congress has the power of appropriation, but not the arbitrary power for any purpose or in any way but by law; not a mere act of Congress unless authorized, but by law. An act of Congress is not law unless "necessary and proper for carrying into execution the foregoing powers or some other powers vested by this Constitution in the Government of the United States or in some department or officer therefor."

It has been suggested that this is only a limitation on executive action. But that assumption is purely gratuitous and does plain violence to entirely unambiguous language.

The power to levy taxes or raise a revenue in any way

or for any purpose no more includes or implies a power in the same body to appropriate the proceeds to those or other purposes than the power to raise and support armies includes or implies the power in the same body to command them when they are raised. Neither the power to raise money nor the power to raise armies is at all useful unless the power is also conferred somewhere to command them when they are raised. Money that no one has authority to take out of the strong box, and an army that no one has authority to take out of camp, are equally useless.

The fact that in granting the power to raise money or the power to raise an army, it was stated (what would have been implied if not stated), that the object of granting these powers was to provide for the common defense and general welfare, and that so far as they go, they do produce those results, in no degree changes the matter. It was still necessary to provide:

> "That the President shall be commander in chief of the army and navy; and that no money shall be drawn from the treasury but in consequence of appropriations made by law."

This is not in terms disputed. It is not in so many words claimed that the power to tax includes the power to appropriate the proceeds, though that is the effect of the argument. The claim made is, that these words, "to pay the debts and provide for the common defense and general welfare of the United States," added to the power of taxation, is a grant of the power to appropriate the proceeds for all purposes. But obviously the specification of the purposes for which taxes may be laid has no such effect, unless the naked power to tax or raise money in any way has. It makes no difference what the purposes for which taxes may be laid are, nor how those purposes

are defined: whether by express terms or by implication from the whole instrument. The inference is just as strong for one purpose as for another, and for purposes implied as for purposes expressed; that the money so raised may by the proper authority, in some way to be determined by such authority, be applied to those purposes. That is, the power to raise money implies that somebody will spend it. Suppose the words, "To pay the debts and provide for the common defense and general welfare," had been omitted, the clause would then have read, "Congress shall have power to lay and collect taxes, duties, imposts and excises." That is the power to tax and nothing else."

But, while the purposes for which the taxes may be laid are not expressed, they are understood; the provision then would admittedly mean that Congress shall have power to lay and collect taxes, in order to promote the general welfare by the use of the enumerated powers, the understood purpose being to promote the general welfare by the use of the enumerated powers.

Story on the Constitution, Sec. 919.

And the appropriating authority created by other provisions could apply the revenues to those purposes, subject to such restrictions as might be imposed, not on the power of taxation, but on the power of appropriation. Under such conditions it is admitted the resolutions of the Virgina legislature are sound, axiomatic. But this understood limitation upon the power of taxation is not the grant of the power of appropriation any more than it is the grant of the power of taxation. The power of taxation for any purpose is given by the other language, "Congress shall have power to lay and collect taxes," and the manner and conditions of the exercise of this

power are elsewhere shown. "Revenue bills must originate in the House," etc. So the power to appropriate this money for lawful purposes is given elsewhere, and that power must be exercised in accordance with the limitations there set out; that is, must be made by law, not by a mere act of Congress, but by a constitutional act.

The argument is in substance that, after the power to lay and collect taxes, in order to provide for the general welfare, substantially this language should be implied:

> "The money raised by taxation may be drawn from the treasury in consequence of any act of Congress, for any purpose it may deem will promote the general welfare, whether to carry into execution any of the powers of Congress, or of the government, or any department or officer thereof, or not."

But, in construing the constitution, as any other written instrument, implications are only resorted to where the instrument is silent on the subject affected; but the constitution has expressly spoken on the subject to which this supposed implication relates, namely, drawing money from the treasury. It has expressly provided an exact contradiction of this assumed implication, "No money shall be drawn, etc., but in consequence of appropriations made by law." not by Congress but by law.

It is everywhere admitted that if this power of promiscuous spending the public money is not to be read into the constitution by implication from these words, this express provision would confine the power of appropriation to the employment of the public money in carrying out measures authorized by the other provisions.

Story on the Constitution, Sec. 919.

For a different provision to be read into the instrument, upon a topic covered by an express provision, to essentially change the meaning of that express provision, is a plain violation of the most elementary rules for the construction of written instruments.

Third. The principal argument in support of the contention is, that otherwise this language, "to pay the debts," etc., is meaningless, and it cannot be supposed that in making so important an instrument as the constitution, words would be employed without a meaning; that without these words the clause would be just what it is contended it means with them; that is, the power to levy taxes, to carry out the constitutional powers. That the clause with these words must mean something else, or the words are without meaning; that they mean nothing else hence must be held as giving the power of promiscuous appropriation.

Thus, Judge STORY says, as to these words:

> "Strike them out, and the constitution is exactly what the argument contends for," *i. e.*, what the Virginia resolutions contend for.
>
> Story on the Constitution, Sec. 919.

Mr. MONROE also.

> "No part of the constitution can be considered useless, no sentence or clause in it without meaning." (Message of May 4, 1822, Messages of Presidents, Vol. 2, p. 173.)

It is no doubt true that persons are generally supposed to mean something by all they say, but this rule can easily be pushed too far. It is not necessary, in order to fully satisfy this rule, that the meaning of the whole context should be held to be different from what it would have been without those words. Persons very often say

expressly what would have been implied from the remaining context if not expressly stated. Implications that seem obvious to the persons using the language may not be seen by others. The capacity of many people for misunderstanding things is unlimited, especially when circumstances arise making it desirable to misunderstand them. The present is a striking illustration.

In discussing the construction of this language, Judge Story himself indicates the propriety of saying things that it would seem might be safely left to be implied. He says if it was the design merely to allow the proceeds of taxation to be applied to promote the general welfare by the use of the enumerated powers, it should have said so in express terms; that it should have read, "To provide for the general welfare in the manner hereinafter provided."

Most people would have thought that could be implied when the limited nature of the Federal Government is considered; but if this language had been added, some other meaning would have to be assigned to the clause then, or the entire clause would have meant the same as without any of these qualifying words, and the conclusion would have to be drawn again that the constitution has used words and meant nothing.

But Judge Story frequently recognizes this. In discussing the supremacy clause, he says:

> "And yet this clause was but an expression of the necessary meaning of the former clause introduced from abundant caution to make its obligation more strongly felt by the state judges."
>
> Section 1839, Story on the Constitution.

Again, in discussing the clause authorizing laws necessary and proper, etc.:

"The constitutional operation of the government would be precisely the same if the clause were obliterated, as if it were repeated in every article."

Section 1237.

Again, in his dissenting opinion, in *Brown* v. *U. S.*, 8 Cr., p. 126, referring to the argument in the opinion of the court, that the power to declare war did not include the power to make rules concerning captures, because that power was a distinct grant which would not have been inserted if the power to declare war had been thought broad enough to sustain it. Judge STORY said:

"The expression of that which is implied in the very nature of the grant cannot weaken the force of the grant itself. The words are merely explanatory and introduced *ex abundanti cautela.*" (p. 150.)

In that case he dissented from the remainder of the court on the express ground that the important words, "to make rules concerning captures on land and water," "meant nothing" in this sense, and that the entire clause of which these words were a part would have meant exactly the same if only the words "to declare war" had been used.

Mr. Monroe, also, notwithstanding his vigorous language that no section or clause can be considered "without meaning," yet says, in the same paper, as to the power to make laws necessary and proper, etc.:

"My impression has been invariably that this power would have existed substantially if this grant had not been made."

Messages of Presidents, Vol. 2, p. 173.

There are numerous instances of words and important words used in this very instrument which "mean noth-

ing" in this sense. For example, the whole preamble, and notably the entire tenth amendment. It is not understood that any one claims that amendment "means anything" in this sense, *i. e.*, that it does anything more than express in abundant caution what would have been clearly implied without it.

These words, "to pay the debts," etc., of the United States, mean no more than to indicate in general terms the purposes for which the great power was given, and the object sought to be accomplished, and in no way enlarge the scope of the general grant or carry any additional power. It is entirely plain that two-thirds of these qualifying words are of this nature, that is, mean nothing in the sense of changing the meaning of the entire clause from what it would have been without them. Suppose the terms, "to pay the debts," had been omitted, would any one doubt the revenues might be applied to that purpose? Or suppose the terms, "to provide for the common defense," had been omitted, would any one doubt the power of Congress to apply the revenues to that purpose within constitutional limitations? If, then, it is plain that by the use of two-thirds of this language it was only designed to express generally the objects of granting the power of taxation, and not to grant additional authority, the inference is certainly fair that the remaining terms, the most indefinite of any, were employed in the same way and for the same purpose. If from these qualifying words the first two items had been omitted, and "only to provide for the general welfare" left as expressing the object to be attained by the use of the taxing power, the two former would plainly have been included.

This language, added to the power to lay taxes, is a

mere general statement of the reasons for granting the power and the results hoped to come from it. The substance is, we grant to Congress the power to levy taxes, because it is for the public advantage that Congress should have this power. Such a statement does not include a grant of additional authority. It may be stated dogmatically that in construing the constitution that is the rule. The preamble contains exactly such a statement. Every grant of power is expressly made in order to establish justice, to provide for the common defense, and promote the general welfare; but all agree that the preamble contains no grant of power. Neither Congress nor any federal authority is given power to do anything outside the enumerated list, however much the general welfare might be promoted thereby, by reason of the fact that the grant of limited authority is made expressly in order to promote the general welfare. Not only is the limited authority granted in order to promote the general welfare, but the exclusion of the federal authorities from other power is likewise done in order to promote the general welfare.

It is provided that the President shall be commander in chief of the army and navy, in order to insure domestic tranquillity, to provide for the common defense, and promote the general welfare. The argument that the expression of the objects of granting a power implies authority to use that power in any way that tends to accomplish those objects, within or without the limited list, would establish that the President is empowered to use his power as commander in chief of the army and navy to insure domestic tranquillity and promote the general welfare generally, not in a limited field.

The Supreme Court is established and Congress given power to constitute tribunals inferior to the Supreme Court, in order to establish justice and promote the general welfare. The same argument would establish that these courts should establish justice generally, and not merely in the limited number of cases within their jurisdiction. So the power to lay and collect taxes is in no degree added to by the expression of the ends had in view in granting the power.

The only power granted by this clause is to lay and collect taxes. The question in reality is, not whether the statement that the power given to Congress to lay and collect taxes is given in order to promote the general welfare, grants more authority than the mere power to lay taxes, but whether saying this twice has that effect when saying it once does not. Every grant of power is expressly made in order to promote the general welfare. Suppose these words, "to pay the debts and provide for the common defense and general welfare," stricken out of the taxing clause, the constitution would then read, "We, the people of the United States, in order to promote the general welfare, do ordain and establish that Congress shall have power to lay and collect taxes." That means one thing: but "We, the people of the United States, in order to promote the general welfare, do ordain and establish that Congress shall have power to lay and collect taxes, in order to promote the general welfare." That means something entirely different.

Fifth. The history of the constitution and of this taxing power leaves no doubt about how the language expressing its objects came to be specially inserted in the grant of this power and not in the other grants.

The members of the convention were largely the same persons who had, as members of the Continental Congress and in other public capacities, learned during the trying years of the Revolution the difficulties in the way of running a government and carrying on a war without money, and how without this power of taxation it was not practical to procure that money. The form in which this trouble had most constantly pressed itself on their attention was in these special matters of paying the debts and providing for the common defense. They had been constantly subjected to the humiliation of seeing the most sacred debts of the United States unpaid. They had been compelled daily to listen to the just complaints of public creditors they were powerless to relieve, and, as patriots, to endure the humiliating spectacle of their country playing the part of a common fraudulent debtor, not because the people were dishonest or unable to pay, but solely because the necessary power of bringing the money together had not been granted. This was so forcibly impressed upon them that a special clause was inserted in the constitution for the payment of those debts.

Beside that, they had seen the common defense unprovided for for the same reason. They had been reading Washington's letters from the field, full of desperate appeals for money and supplies; pointing out that the army could hardly be kept together; that the soldiers who had not left the service were freezing, naked and hungry at Valley Forge, and elsewhere; that the greatest danger to the life of the nation was not the avowed enemy, but the lack of money. When, then, the "more perfect Union" came to be formed, to remedy the defects of the old one, it is not surprising that at the very first of the

powers granted to Congress, was placed the grant of this essential power, to provide the means for exercising the powers through which the great objects of the whole proceeding as set out in the preamble could be attained; and when this grant was framed, the minds of all these men filled full of the failure of the former system in these special respects, should have added to that grant such an expression as "to pay the debts and provide for the common defense of the United States." Out of the fullness of the heart the mouth speaketh. But this language, which would come spontaneously from the mouth of every one of them, would manifestly restrict the matter too much. There are other things we are providing for Congress and the government to do; and they cost money; and, of course, the funds in the treasury must be available for those purposes; and, while if nothing is said as to the objects of taxation, all would be plain yet the specification of these specific objects might seem to deny the power for any other purpose. But, for these any general terms will suffice. For that purpose, this already used and understood phrase, "the general welfare," was at hand and added. I imagine it would have greatly surprised those men to have been told that by the use of these words in that connection they would ever by anybody be understood to have meant, to extend the jurisdiction of Congress for any purpose over all the subjects from which throughout the instrument they had studiously excluded it.

Sixth. Another consideration that conclusively rebuts any claim that the addition of these words "to pay the debts and provide for the common defense and general welfare of the United States," was intended to grant any authority in addition to the power to lay and collect taxes, is this:

The clause as first reported to the convention, read: "Congress shall have power to lay and collect taxes, duties, imposts and excises," *i. e.*, the present clause, with the words "to pay the debts and provide for the common defense and general welfare of the United States," stricken out. As it thus stood it is conceded, the money thus raised could only be applied in carrying out the enumerated powers.

Story on Constitution, Sec. 919.

This clause "to pay the debts," etc., was then added by amendment for two purposes, first, to make special provision for raising money to pay the revolutionary war debts; second, to allay the jealousies and quiet the alarms of persons who feared the power, if left unrestricted, might be used for unconstitutional purposes. Judge Story admits this:

> "The truth is (as the historical review also proves), that after it had been decided that a positive power to pay the public debts should be inserted in the Constitution, *and a desire had been evinced to introduce some restrictions upon the power to lay taxes, in order to allay jealousies and suppress alarms,* it was (keeping both objects in view), deemed best, to append the power to pay the public debts to the power to lay taxes, and then to add other powers broad enough to embrace all the other purposes contemplated by the constitution."
>
> Story on the Constitution, Sec. 930.

It would be a most unusual way of accomplishing these results to add a provision increasing the power it was designed to restrict. To allay jealousies and suppress alarms, lest the power to tax without restrictions, might be construed too broadly, a provision is introduced, making it broader. Rather the identical language that was

inserted, expressly to prevent any such idea as that the power was given to lay taxes for other than constitutional purposes, is the language that of itself introduces into the Constitution the very idea it was designed to exclude. Yet, we are seeking the natural and obvious import of the language.

Seventh. These words again are only attached to the grant of the power to lay and collect taxes. The implied power can, of course, go no further than the express power from which it springs as an incident. The power to levy taxes for a specific purpose might, for argument's sake, be conceded to imply the power to appropriate the money raised by that power to such purpose. This, too, is all that is claimed in terms by the advocates of the theory, though the rest is assumed without argument to follow. Mr. Monroe in his famous message to Congress on the subject, states it thus:

> "That nothing more was granted by that part than a power to appropriate the public money raised under the other part."
>
> Monroe's Message, May 4, 1822, on Repairs of Cumberland Road.
>
> Story on the Constitution, Sec. 984.
>
> Messages of President, Vol. 2, p. 73.

Mr. Calhoun states it thus:

> "First the power is given to lay taxes; next, the objects are enumerated to which *the money accruing from the exercise of this power may be applied.*
>
> Speech in the House of Representatives, February 4, 1817; Annals of Congress, 14th Cong., 2nd Session, pp. 855, 858.

But power is given to raise money in other ways; the power is given to borrow money, and to this power, this enlarging restriction is not attached. The absence of this

addendum from the power to borrow money, leaves it, of course, in the same state as it is admitted the taxing power would be without it. If the construction is sound, that the addition of these words to the taxing power, was really meant to grant the right to use this power for purposes for which no other power was allowed to be used and to apply the money raised by taxation to such uses as has been claimed, there would be a distinct sensible reason for the distinction. The framers of the Constitution might have reasoned, as many constitution makers have since reasoned, being taught by more experience. As long as the people pay cash for improvements, extravagant and reckless action is not so much to be feared; but if bonds can be issued and the expenses left to the future, there is no limit to the South Sea speculations they may be led into. This case is no exception. If it was understood that no bonds could be issued or money borrowed, or the burden in any way pushed off onto posterity, but the expense would have to be paid by immediate taxation, there would be no possible chance of inducing Congress or the people to take up the project. It is a clear instance of what Judge Davis properly called "a mania for running into debt for improvements." If the supposed implication had been expressly added to the taxing power, and it had been in terms said that the proceeds of taxation might be spent for such improvements, the distinction would be manifest.

Suppose the matter supposed to be implied had been expressly stated. The clause would then read thus:

1. Congress shall have power to lay and collect taxes; provided, that money raised by taxation may, in the discretion of Congress, be appropriated not only to execute the powers of Congress and of the United States govern-

ment and its officers, but to make roads and canals and in such other ways and for such other purposes as Congress may deem will promote the general welfare.

2. To borrow money on the credit of the United States.

The purpose to make a distinction as to the purposes for which the two powers could be used would be plain enough.

The only reason why the distinction is not at once seen by everybody, is that such authority is neither expressed nor implied in this addendum to the taxing power.

The language used by many of the advocates of the theory is, that in appropriating money, the general welfare might be promoted in extra constitutional ways, but manifestly the utmost that could be claimed would be the right to use the power of taxation alone for that purpose; but, in this case, the means provided, aside from an appropriation of an immediate surplus, is the power to borrow money. As in every other case of the kind, it is proposed to leave the burden for posterity to carry. The act being an entirety, all its parts mutually dependent, and the vital part not being sustained, the whole must fall, unless, of course, sustained by other clauses.

Eighth. But it is submitted, the whole contention is unsound. The general welfare is the object of all legislation. The widest power ever claimed by or for the British Parliament, is the power to promote the general welfare. In our system of government, the duty and power of providing for the general welfare have been distributed between two governments. The general body of this power has been reserved to the states; certain enumerated powers have been turned over to the general

government. *Certain subjects-matter*, as to which it was thought best to act jointly have been referred to the general government. As to all other subjects-matter, control of them was reserved to the states, because it was believed that as to these matters, the local authorities and the people of the states were better able to judge what would promote and what would hinder the general welfare than Congress could be, and of these things that would promote it which would promote the general welfare in the greater and which in the less degree. The joint judgment of the representatives of all the states is preferred as to the subjects affecting them all. The separate judgment of each state is preferred as to the other matters. The distinction is not as to what special means may be employed by the different authorities, but as to the different subjects-matter upon which they may act at all. It is not, for example, provided that Congress may punish by fine, but not by imprisonment, the act of selling intoxicating liquor in a state, or, that the states may punish offenses committed on the high seas by imprisonment but not by death; but, in each instance the whole subject-matter is given over to the authorities respectively entitled. The people of Maine are the best and the sole judges of whether the sale of intoxicating liquors in Maine promotes or hinders their welfare, and give no right to the people of Kentucky to any voice in the matter by the use of money or otherwise. Throughout the whole Constitution, the purpose is found to grant the entire control over some subjects-matter to Congress; and as to all other subjects-matter, that they should be entirely reserved to the states; and the entire exemption of everything, except the specified list from congressional influence or control, was, from the beginning, guarded jealously. Before a construction can be adopted, that it

was designed in the grant of one power, and that easily the greatest and most far-reaching of them all, to reverse the rule, and to give Congress the right to employ this greatest power to enforce its views on any of the subjects-matter reserved to the states, the plainest and most unmistakable language must be employed.

Take the matter of domestic slavery in the states. Nothing can be plainer than that this matter was in no degree committed to Congress. The people of South Carolina, it is certain, could by no means have been induced to ratify a constitution which would have admitted the people of Massachusetts to any voice whatever in determining whether slavery should or should not exist in South Carolina. Nor could the people of Massachusetts have been induced to ratify a constitution which would give to the people of South Carolina any voice in determining whether slavery should or should not exist in Massachusetts.

When the question of the right of Congress to make internal improvements was under discussion, Mr. Calhoun was its principal supporter in Congress; he, defending the claim of the right under this qualification of the taxing power; insisting that the power to levy taxes for the general welfare implied the power to appropriate the proceeds to the general welfare in ways not otherwise authorized; that, therefore, even if the power could not be deduced from any of the enumerated powers, yet money could be applied for that or any other purpose, provided Congress should be of opinion, that such application of the public money would work for the general welfare. This was strange language to come from that source, when subsequent events are remembered. A little later, when the same power to lay and collect taxes, duties and imposts was exercised to promote the general welfare in

a way, he disapproved; it was so plainly unconstitutional that South Carolina was justified in refusing to obey, and the Nullification Resolutions were the result.

Suppose, in 1817, instead of a proposition, to appropriate public money to roads and canals, a bill had been introduced of this character:

"Whereas, the general welfare would be greatly promoted by the abolition of slavery in the several states, and by the spread of intelligence among the people; and whereas, the matters of education and slavery in the states are reserved to the people and the states, respectively, therefore, be it enacted, etc."

First. That one million dollars be expended in each state for the establishment of schools, in which the evils of slavery shall be taught.

Second. That a direct tax be laid upon the people of the several states, in proportion to their population, to provide the funds for such expenditures.

Third. That twenty million dollars be appropriated for this purpose out of any money in the treasury not otherwise appropriated, to be expended under the direction of the Secretary of War.

Mr. Calhoun's argument on the internal improvement question would have hardly been delivered. He would have replied: "This is a question that has not been referred to you. Each state determines these questions for itself. If, in reply to this it had been suggested, true, Congress, for substantial reasons, has been denied power to act directly on this question, but it has authority to lay taxes and expend the proceeds in such way as may be thought to promote the general welfare. With what patience would he have listened or answered? This thing

has not been given to you in any part; it is none of your business. What you are not authorized to do directly you are not authorized to do indirectly; nor have we authorized you to levy taxes for us to pay for the purpose of spreading in South Carolina, or elsewhere, the wild crazes of Massachusett's fanatics." And how could he have been answered? Yet there is no doubt that any means that would have brought about the abolition of slavery would have been more distinctly promotive of the general welfare than any other conceivable thing.

Ninth. Even the prohibitive clauses of the Constitution would have been no more immune. An act of Congress in Calhoun's time, framed in the language of the present Thirteenth Amendment, would have been no more and no less void and contrary to the letter and spirit of the Constitution than a bill of attainder. If it is the correct theory that money may be lawfully appropriated for purposes other than those provided for, that Congress in exercising this power to appropriate money is exempt from restrictions by which it is bound in exercising its other powers, it follows, that while Congress could not directly condemn to death a man whose removal it might be of opinion would promote the general welfare, yet it could appropriate money to pay an assassin, who would thus promote the general welfare. This is, of course, an absurdity. It was never intended to authorize Congress to hire another to do what it was forbidden or not authorized to do directly; but it is the inevitable outcome of any possible reasoning from which it can be concluded that these words added to the grant of the power to levy taxes, gave the right to use the power and appropriate the money so raised for any except constitutional purposes. There is no middle ground.

Either the language means, to grant power to Congress, to levy taxes, to provide for the general welfare, by doing the different things authorized to be done for that purpose, or it means, to authorize Congress to use this power to promote the general welfare in any direction or on any subject. Congress in exercising this power is subject to the same restrictions as in exercising the other powers, or it is subject to none. Things expressly prohibited are no more sacred than things unauthorized.

10. But it is submitted the Supreme Court has disposed of this question.

Every power to promote the general welfare given to any government in the United States is given to the federal or state government. Every lawful object not federal is state; the contention as to this clause in substance is, that while in every other respect Congress is excluded from any interference with the purposes reserved to the state, yet in the exercise of the power to lay and collect taxes, and the inferred power to spend the proceeds, these limitations do not apply. This qustion was involved in *Gibbons* v. *Ogden*. One of the questions raised in that case was whether the states might not also regulate commerce. It was argued that the power to regulate commerce likewise existed in the states, because the prohibition against the states levying duties was an exception out of the power to regulate commerce, and if the main power had not existed, the exception would not have been made. In deciding this question the court said:

> "Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments, nor is the exercise of that power by the states an exer-

> cise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. *Congress is not empowered to tax for those purposes which are within the exclusive province of the states.*"
>
> *Gibbons* v. *Ogden*, 9 Wheaton, p. 199.

To reason that Congress may not levy taxes for state purposes, but may levy taxes for the general welfare outside of the enumerated powers, is a simple contradiction of terms. Federal and state cover the entire governmental field. "The foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof" cover the whole federal field. Everything else is reserved to the states, or not granted at all. Every governmental purpose except those committed to the United States, is a state purpose.

To say that it is among the enumerated powers of Congress to levy taxes for the general welfare, as thus defined, is to argue that Congress may not levy taxes for state purposes, but may levy taxes for state purposes.

It is, of course, not claimed that this is a state purpose. It is neither state nor federal, but wholly outside the whole government field.

But the doctrine of *Gibbons* v. *Ogden*, that congress is not authorized to levy taxes for state purposes, is a complete denial of all that was ever claimed for this general welfare expression.

That claim was that by these words the power to tax was extended beyond the field of enumerated powers into the field of state purposes.

The question put in the concrete form in which it arose

at the time it was discussed, and this clause claimed as a justification for paying the expenses of internal improvements out of the federal treasury was this: Has or has not congress, under the taxing clause, power to levy taxes and appropriate the proceeds to pay, with the permission of the state, the expenses of constructing roads which the states have and congress has not authority to construct?

Of course, if congress, under the enumerated powers, had itself the authority this question would not arise. Nobody ever doubted the right to pay for such things out of the federal treasury.

That is what the federal treasury is for.

The argument in favor of the claim proceeded on the theory that the United States, in making such expenditures, was a mere generous benefactor, and the only question involved was whether the dignity of the state would be seriously hurt by making the expenditures within its borders if the consent of the local authorities was first secured.

It is asked, "Why not, since it is for the general welfare?" Story on the Constitution, Sec. 925.

Because it costs money, and the money must be raised by taxes. If some benevolent stranger should come and ask permission to build a road or school house at his own expense there would seem to be no reasonable objection.

But that is not what is claimed. It is the power in congress to lay taxes for these purposes.

Now, when the question whether a certain road should or should not be built in any state comes before the legislature the question is not merely whether the

general welfare of the state would be promoted by the road if it cost nothing, but whether the general welfare would be promoted enough to justify levying and collecting a tax to pay for it.

Suppose, then, this question as to a road proposed to be built in Illinois is submitted to the legislature of Illinois; it being conceded that the question is one that legislature is and congress is not authorized to decide.

The legislature, with its full knowledge of local conditions, determines that it would not sufficiently promote the general welfare to justify taxing the people in their then condition and raising the money to build it.

Then congress takes up the subject and reaches a different conclusion, viz.: that the road should be built, and directs the levy of a tax to raise the money for the purpose.

If this tax is laid equitably and distributed equitably among the states, and each state gets the benefit of its own contribution, then a tax has plainly been laid on Illinois for a purely Illinois purpose by authority of congress. If, however, the money raised in Illinois is spent in Vermont and California it is equally plain a tax has been laid by congress in Illinois for the state purposes of Vermont and California.

True, the state might protect its dignity if anybody thought such dignity worth protecting by refusing to allow the work to be done, but it could not prevent the collection of the tax.

The reasoning contradicts itself. It is argued—This clause gives congress power to lay taxes to pay for certain local improvements which it may think would promote the general welfare. The power to tax for this

purpose, it is argued, implies the power to appropriate the money to that purpose. If so, then congress has the right of its own authority to apply the money to the work, and is not obliged to ask permission of the state. But it is always conceded that the consent of the state must be first secured before the money can be spent there. If the permission of the state has to be secured to apply the money, it would seem clear the like consent of the state should be secured to raise it, both powers being given, if at all, by the same clause. The conclusion that congress has power under the constitution to do a thing, and that power cannot be exercised in any state without first obtaining the permission of the state, is believed to be obsolete since 1861, or rather since 1837. The theory that after a state legislature, in the exercise of an admitted exclusive authority, has determined a certain improvement should not be made in the state, and a tax should not be levied by state authority to raise the money for the purpose, it was designed to give congress the power in cases in which it might be of opinion the general welfare would be promoted by the improvement to levy and collect the tax and put the money in the treasury, and hold it there, without authority on its own account to apply it to the purposes for which it was raised would seem to contradict the whole argument on which this claim is based, *i, e,* that the power to tax for the general welfare implies power to apply the money to the purposes for which it was raised.

The local authorities might even object to the so-called improvement at all. What congress thinks is an improvement, the state legislature or its subordinate municipalities might consider a nuisance. Then, if congress is authorized to lay and collect a tax for this

purpose, that means that congress has authority to collect the tax and then must lock it up in the vaults and keep it there, because without authority to apply it to the purpose for which it was raised, the exact condition upon the assumed impossibility of which the whole argument rests.

Taxes laid for such purposes to pay for doing things the states are alone empowered to do for the welfare of the state, and which congress is not empowered to do, and which can only be applied to their purpose, with the consent of the state legislature, are as plain a violation of the rule cited as a tax laid by congress to build state houses, because it might not unreasonably conclude that the general welfare of the whole country would be promoted by the welfare of its constituents.

It may be taken for granted that if this general welfare expression does not extend the power so far as to authorize the levy of taxes to pay for improvements in Pennsylvania, for example, with the consent and under the authority of Pennsylvania, which congress may think will promote the general welfare, it does certainly not extend it so far as to give power to levy taxes, to pay for improvements in Panama, because congress may think these improvements would in some way promote the general welfare.

11. There is, of course, an obvious distinction between a tax laid for a specific purpose as paying debts or building sidewalks, and a tax laid in order to promote the general welfare. As has been said elsewhere, money cannot be directly appropriated to the general welfare, but can only be so applied by doing something the United States is authorized to do for that purpose, but even if the doctrine of the Virginia resolutions be

not accepted, that is, that money can only be properly applied to carry out a constitutional measure, and if it should be held that it can be used otherwise than by carrying out lawful United States measures, as by buying stock in the Delaware and Chesapeake Canal Company, yet, if it is applied to any measure, it certainly must be agreed that that measure must be constitutional. That an appropriation to withdraw money from the treasury to enable the United States to do a thing forbidden or not authorized is not an appropriation made by law. The veto by Mr. Monroe of the bill to repair the Cumberland Road vetoed an appropriation because it was made to carry out an unconstitutional statute.

For the reasons suggested, it is not necessary for the purposes of this case that the doctrine referred to should be adopted in full. The clause construed in the broadest way does not cover this case. This is not a naked appropriation of the proceeds of taxation to aid something done under other authority which is all Mr. Monroe's message claims authority for. It is an exercise of the power to appropriate money from all sources not merely from taxation and to borrow money on the credit of the United States to carry into execution a measure of Congress.

For such a case there is no escape from the salutary test.

> "Whenever, therefore, money has been raised by the general authority and is to be applied to a particular measure, the question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite may be applied to it. If it be not, no such application can be made."

But the general welfare would be greatly promoted, if in this or some other case, that clear expression of the natural and obvious import of the language of the Constitution could be definitely announced as the law, and the open door to the treasury be permanently closed.

The construction here contended for makes a consistent whole of the entire instrument, giving a sensible meaning to every part.

The only possible inference from the statement that the power of taxation is given in order to promote the general welfare, is that in some way the appropriating power shall employ the funds in accomplishing that purpose. Now, if there was no way in which appropriations made by law would promote the general welfare, it might be argued that there was some inconsistency between the indicated purpose of taxation and the limitation upon the power of appropriation that it should be only by law. But, unless it can be said that the enumerated powers do not, when exercised, tend in any degree to accomplish the object for which they are all expressly granted, viz.: to promote the general welfare, then there is no such inconsistency. But the two statements that the power to lay taxes is granted in order to promote the general welfare and that appropriations can only be made by law, stand together in perfect harmony.

But even if all that has ever been claimed for this clause, to provide for the general welfare, be conceded it does not reach this case. It does not authorize the improvement of foreign countries, even though their improvement might benefit our people. No doubt the advancement of other people does work to our advant-

age. It is greatly to the profit of the people of the United States that Europe has railroads, canals and rivers running all through the country. Our "commerce with foreign nations" is largely dependent on them. The same considerations that are supposed to show the improvement in or the creation of, transportation facilities in Panama, as a promotion of the general welfare, would in a greater or less degree apply to a railroad from Liverpool to London, or to the Suez Canal. The object publicly assigned would certainly embrace all people who on earth do dwell.

But that is not the law.

It is the general welfare of the United States that is to be promoted, not of the whole world.

V.

In the opinion of the court of appeals, an entirely different position is taken from that of the assistant attorney general in the brief filed below.

The contention of counsel for the appellee from the beginning has been that the authority for these measures was in the commerce clause. But the Court of Appeals did not accept this contention, but its reasoning is, in substance, this:

First. The states have the power, in their own territory, to build public roads.

Second. The United States has the same authority in the territories.

Third. The place where this railroad and canal are to be built and operated is the territory of the United States.

Fourth. There is no difference between a free, public highway on the one hand and, on the other, a railroad or commercial canal like this one. Therefore, congress has authority under its power to make needful rules and regulations respecting the territory of the United States, or under its implied authority to govern such territory to build and operate a railroad and commercial canal in the canal zone.

This reasoning is faulty in two of its essential premises:

First. This zone or strip, wherever it may be, is not the territory of the United States.

Second. There is a very essential and fully established difference between a free public highway on the one hand and a railroad or canal of this character on the other.

The claim that this strip is American territory is something entirely new in these discussions and, clearly, cannot be defended. It is impossible to find it, but this much is known, that if it is anywhere, it is in Panama and is not in the United States.

First. The political departments of the government, to which, primarily, the decision of the question whether or not the sovereignity of the United States extends over any particular territory belongs, are unanimous in disclaiming any such power.

The president of the United States, in an official communication to the secretary of war, to whose department the conduct of these matters is committed, intended as instructions to the secretary of war, then about to depart for the Isthmus on an official mission to the government of Panama with reference to the canal, used the following language:

"There is ground for believing that in the execution of the rights conferred by the treaty the people of Panama have been unduly alarmed at the effect of the establishment of a government in the canal strip by the commission. Apparently they fear lest the effect be to create out of part of their territory a competing and independent community which shall injuriously affect their business, reduce their revenues, and diminish their prestige as a nation.

The United States is about to confer on the people of the State of Panama a great benefit by the expenditure of millions of dollars in the construction of the canal. But this fact must not blind us to the importance of so exercising the authority given us under the treaty with Panama as to avoid creating any suspicion, however unfounded, of our intentions as to the future.

We have not the slightest intention of establishing an independent colony in the middle of the State of Panama, or of exercising any greater governmental functions than are necessary to enable us conveniently and safely to construct, maintain, and operate the canal under the rights given us by the treaty."

Letter of Oct. 18, 1904.

In the daily conduct of this particular matter of the construction of the canal the executive department is acting upon the theory that this foreign, not domestic territory.

Laborers are imported from Jamacia and elsewhere to work on the canal and it is matter of public report that it is in contemplation to bring with the Zone large numbers of Chinese and Japanese laborers under contract to labor in the canal. The express provision of the act of February 26, 1885, forbids such contracts for laborers "to perform labor or service of any

kind in the United States, its territories or the District of Columbia."

Yet these importations are freely made and justified because the strip is foreign territory.

Again, the war department, which is the department in charge of canal matters has similarly construed the relations of the United States toward this strip.

The secretary of war, in an address delivered at Cincinnati, on May 27, 1905, used the following language:

> "If the Panama Canal were inside the territory of the United States, of course, all material which went into the canal would necessarily pay duty or be bought in the United States. But the construction of the canal is a number of days' journey from the Tariff Wall of the United States."

Again, the treasury department has made a similar official construction; the appellee himself, the secretary of the treasury, is now collecting duties upon all goods transported from the Canal Zone to the United States at the regular Dingley tariff rates, and shipments of goods from all parts of the world that, under the Dingley act would be dutiable if imported into the United States are admitted into the canal zone without the payment of such duties upon the express ground that this strip is "foreign territory" and not the territory of the United States.

Under these conditions, it would seem hardly necessary to examine further, but the treaty leaves the matter not at all doubtful

If it were the purpose of the treaty that Panama should cede to the United States the strip of land in question it would have been a simple matter to say so,

and a more awkward and unintelligent form of saying that thing could hardly have been devised than the one employed. Further, a simple form for such a cession could have been found in any one of five or six different treaties between the United States and foreign powers.

And this is not an instrument to be construed as the will of a farmer made without counsel. The paper was signed by skilled persons who knew the meaning of the terms used.

The article would have read "the Republic of Panama cedes to the United States the territory in question" and nothing further need have been said.

But article Two says:

> "The Republic of Panama grants to the United States, in perpetuity, the use, occupation and control of a Zone of land, etc., for the construction, maintenance, operation, sanitation and protection of the said canal of the width of ten miles, etc."

The grant of the right to use property for one specific purpose has never been construed to be a conveyance of the entire title.

Article Three states that the Republic of Panama grants to the United States the right to exercise certain authority within the zone "which the United States would possess and exercise *if it were the soverign of the territory* within which said lands and waters are located." This is an explicit showing that the United States is *not* the sovereign.

But if this is United States territory of what possible use are these provisions?

> "The Republic of Panama agrees that there shall not be imposed any taxes, national, municipal, departmental, or of any other class, upon the

canal, railroad and auxiliary works, etc." Article 10.

The Republic of Panama stipulates to

"permit the immigration and free access to the lands and workshops of the canal and its auxiliary works of all employees and workmen of whatever nationality under contract to work upon, or seeking employment upon, or in any wise connected with, said canal and its auxiliary works, with their respective families; and all such persons shall be free and exempt from military service of the Republic of Panama." Article 12.

Or, that the United States may have leave to import into the canal zone the limited number of articles suitable for canal construction, described in Article 13. Article 13.

Or this,

"If it should become necesssary, at any time, to employ armed forces for the safety or construction of the canal, the United States shall have the right to use its police and land and naval forces, or establish fortifications for these purposes." Article 23.

If this strip is United States territory, it is clear enough that these provisions were wholly unnecessary. Let these provisions of the treaty be considered in connection with this rule.

"The court, in construing the constitution as to the grant of power to the United States and the restrictions upon the states, has ever held that an exception in a particular case presupposes that things which are not excepted are embraced within the grant or provision."

Rhode Island v. *Mass.*, 12 Peters, 657-722.

The provisions above quoted are plainly exceptions out of sovereignity and presuppose the existence of sovereignity in Panama from which they are excepted.

Plainly this is not and was not intended to be a cession of this strip. Under these conditions, any discussion of the extent of the power of Congress in the territory of the United States is merely academic.

Second. There is an essential distinction between a common public highway on the one hand and a railway or commercial canal of this character on the other.

Building and opening to free public use a common public highway is one thing. That is as argued by Counsel for Appelle "public business" that may be done by a state within its limits or by the United States in its territory. To carry on the business of a common carrier over that road, or to sell transportation in any form over a road is something else. That is private business that neither a state in its territory, nor the United States in Arizona or the District of Columbia has authority to carry on.

To build a railroad or a commercial canal or transportation plant of any kind is carrying on commerce, and, since the Pacific Railroad cases, to be classed with the private business of carrying on commerce.

This distinction was recognized in the argument below except as to the difference between public highways and transportation plants.

It is argued that:

> "It is public, not private business, to build highways."

That is true and therefore building highways is not commerce and Congress has nothing to do with it under the commerce clause.

But building as well as operating transportation plants, is private business. The Supreme Court, in

the Pacific Railroad and other cases, held that to be commerce, hence could be regulated not done by congress.

It is only because of this ruling that the building of inter-state railroads is subject to congressional control at all; because, in other words, it was decided that a free public highway was one thing and a plant for carrying on transportation business another.

Building the public highway is public business which a state legislature with a general grant of power to do public business may do, "But this power is entirely distinct from that of regulating commerce."

But building transportation plants by transportation companies is part of the commerce of such companies, and regulating that is regulating commerce.

It is argued that the appellant

> "confuses the carrying trade with the rivers and oceans upon which it is conducted. What we propose to do here is to make an ocean for our inter-state and foreign carrying trade; make a greater ocean out of two smaller ones."

Then, that settles it. Building oceans is not carrying on commerce, and therefore not within the clause of regulating commerce.

But let the argument be taken, as clearly intended. The premises and conclusions are these:

1. Building highways is public business.

2. The carrying trade over those highways is private business, not to be confused with the public business of building them.

3. Railroads are public highways.

4. Congress has not merely power to do the limited

number of things authorized by the constitution, but all public business, but no private business.

Therefore Congress has authority to build railroads but not to operate them.

But, obviously, no corporation, trading or political, or both, can have authority to build such a road that has to be and is adapted and designed to be owned and operated, except a corporation that has corporate authority to operate it and as incidental to and part of the power to operate it.

The concrete conclusion of the reasoning is, that Congress has constitutional power to acquire the railroad and build the new proposed double track and then must let it lie there, and rust out, because without power to carry on the private business of transporting goods and persons over the road, and may enlarge its plant by building this canal, but must then let it lie idle because without power to carry on the necessary business of operating it by selling transportation between its terminal points.

This is a *reductio ad absurdum*, but the mathematically unavoidable result of pushing beyond its legitimate limits the pure legal fiction that transportation plants are public highways.

But, manifestly, that is not the purpose of either the act or the treaty. The U. S. is today operating its railroad like any other railroad company carrying on the commerce of a common carrier.

Both the treaty and the statute contemplate not merely acquiring and improving the railroad and finishing the canal, but the operation of both, and the operation is so essential a part of the scheme that of

course, if the right to operate fails, the provisions for construction would be held dependent and fall with it.

Section Two of the act requires the president to acquire for the United States, perpetual control of a strip of ground, and not merely to construct, but to perpetually maintain, *operate* and protect "a canal, etc. * * * the right to perpetually maintain and *operate* the Panama Railroad."

The treaty, likewise, throughout provides not only for the construction of the canal, but its operation. Act. II, IV, V, VI, VII, VIII, IX, XI, XIII.

There are roads and roads, there are, perhaps, canals and canals just as there are houses and houses. Congress has authority to build some houses and no authority to build other houses. To build a house adapted and intended for use as a court house in the District of Columbia or in Arizona would be within the authority of Congress, and money could be lawfully appropriated for that purpose. But to build a house adapted and intended for a dry-goods store in the same place would be outside the power of Congress, and money could not be lawfully appropriated for that purpose.

So, to build a free public road or highway in the District of Columbia, or in Arizona, may be conceded to be within the power of Congress, and money might be lawfully appropriated for that purpose. But, to build a road or canal adapted and intended for use as a part of the plant of a common carrier, or of a merchant selling transportation in any form is as plainly outside the power of Congress, and money cannot be lawfully appropriated for that purpose.

A corporation authorized to manufacture boots and shoes may build a house adapted and intended for use

as a shoe factory. Such a house is a means appropriate to the end which for such a corporation is legitimate. In building such a house, such a corporation is employing a means appropriate to the manufacture of boots and shoes; it is, therefore, manufacturing boots and shoes. But a house intended and adapted for use as a custom house would be a means appropriate for the end of collecting taxes, which, for such a corporation, would be an illegitimate end because such a corporation is not authorized to collect taxes.

But, if a house adapted and intended for use as a custom house is built by Congress, such a house would be a means appropriate to an end which, for Congress, is a legitimate one, viz.: the collecting of taxes, and Congress, in building such a house, is collecting taxes, and Congress may build such a house because it has authority to collect taxes. But Congress may not build a house adapted and intended for use as a shoe factory because the end of manufacturing shoes is, for Congress, an illegitimate end. So, a road adapted and intended for public use as a free public highway is a means proper to an end which, for a state in its territory, or, for Congress in the territories of the United States, is legitimate. But a road adapted and intended for use as a part of a plant of a merchant dealing in transportation is a means appropriate to the end of carrying on commerce which, for Congress, is an illegitimate end.

The distinction between oceans or public highways and the carrying trade over them, which it is said appellant confuses is the exact distinction that is insisted upon, the exact distinction that the definition of regulating commerce in *Gibbons* v. *Ogden* establishes.

Building a highway is one thing, running a line of stage coaches over that highway is another thing; running the stage coaches is commerce, building the highways is "public business"; running the stage coaches is private business.

But under the commerce clause Congress has absolutely nothing to do with public business; its sole concern is the private business of carrying on commerce. The necessary conclusion, therefore, is that Congress has nothing to do with the public highways. The power to regulate commerce is the power to prescribe the rule according to which the stage coach proprietors should carry on their commerce. But, building the highways, not being carrying on of commerce at all, Congress has no power over it.

Third. Even an absolute cession of this strip would not help matters, even if it were intended, instead of a transportation plant, to build a common public highway. It might be fully conceded that the United States in the territories may, as an incident to its sovereignty over the territory, make common public highways for the use of the people of the territory and for its development, but that does not mean that Congress is authorized to spend public money in making roads of any kind ,whether public highways or transportation plants, in any place at home or abroad where it can get a right of way, even if to comply with forms and get around constitutional limitations, the formal sovereignty over that right of way should be ceded. Suppose the United States holds or acquires a strip of ground one hundred feet in width and proposes to cover the entire strip with macadam and establish it as a free public road. It is clear the expenditure for the

construction of such a road could not be justified as an incident of the power to govern the territory through which it runs because there is no territory to which such a road can be an incident. The situation would not be materially changed if, in addition to the one hundred feet, we should acquire a narrow strip on each side of the road as a means of protecting and caring for the road. Such a strip is a mere incident to the road not the road an incident to the strip.

It would seem to be plain that as a mere commercial matter under the commerce clause, for the purpose of promoting the commerce between New York and San Francisco, Congress has no authority to expend the public funds in the construction of a road of any kind between the two points. Its sole authority in that field is to prescribe the rule according to which merchants conducting such commerce are to be governed. As an incident of its power and duty to govern its territory such an expenditure could not be justified under the above circumstance because there is no such territory to which the road could be an incident.

The entire candor and absence of false pretense in these proceedings make it less difficult in this case, than in some others, to determine just where this enterprise belongs. The whole proceedings from the beginning show that this strip is a mere incident to the canal and railroad, not at all the canal and railroad an incident to the government of the strip. The Act of Congress at the basis of the whole proceedings provides for acquiring this strip solely as a means of constructing and operating the canal. The treaty is just as explicit. What is granted by the treaty is the use

of certain land "for the construction, operation, maintenance, sanitation and protection of the canal." Nobody has ever been in any way concerned about the strip, except as a place to build and operate a canal, and I apprehend it will not be claimed that the canal or railroad is proposed to be built or operated for the use of the people of the Isthmus or the development of the strip. The canal is not made for the strip, but the strip for the canal.

So in the argument below this was distinctly avowed—thus:

> "All these things like governing the zone, sanitating the cities and similar things are incidental to the construction, protection and operation of the canal."
>
> Page 13 of Argument of Counsel for defendant in the Supreme Court of the District of Columbia.

Further, the President in the letter to the Secretary of War, already cited, said the same thing:

> "We have not the slightest intention * * * of exercising any greater governmental functions than are necessary to enable us conveniently and safely to construct, maintain and operate the canal."

This canal and railroad are to be built and operated, if at all, not for this strip, but as a mere commercial project for the commerce of the world, and as such must find justification in the commerce clause or not at all.

The argument already offered in discussing the post-office clause is in point here. While it is a rule as to all corporations authorized to carry on a principal business that principal business would include author-

ity to carry on a mere incident, the incident would not give authority to carry on the main business. A railroad company, for example, may establish eating houses for the convenience of the passengers, but an eating house company could not build and operate a railroad as an incident to the eating house. At the suit of any stockholder the use of the eating house company's funds for that purpose would be enjoined.

Jacksonville, etc., Railroad Company v. *Cooper*, 160 U. S., 514.

So, while the sovereignty over the territory of Arizona might authorize Congress to build a highway from Phoenix to any other point in Arizona because such a road would be a mere incident to the government of Arizona; yet the sovereignty over such a strip as this, manifestly a mere incident to the canal and acquired solely as an incident to the canal could not sustain the principal business of building the canal and railroad; the principal business of the United States at the Isthmus is not governing the strip; its principal business is the construction and operation of a railroad and commercial canal. As purely incidental to that principal business, it is attempting to preserve order in the adjoining territory. Counsel for appellee argued below:

> "If *otherwise* we have the right to build and operate the canal, then this governing and sanitating the cities is merely incidental." Page 13.

The question then is whether, "otherwise," i. e. under the commerce clause of the constitution, Congress has the direct authority to build and operate this railroad and canal.

At the time this act was passed, we had no rights in Panama. Congress could, at that time, not have been, in passing this act, exercising any power to govern the territory of the United States. Congress had simply concluded that commerce, foreign and domestic, would be facilitated by the establishment of a plant to provide transportation facilities, for cargoes from the Atlantic to the Pacific over the territory of Panama or Nicaragua, and determined to construct and operate such a plant at the public expense and for account of the United States. Congress was certainly not, at the time, either exercising or pretending to exercise any power to govern any territory of the United States, for, at that time there neither was, nor was claimed, nor expected to be any territory of the United States at either place. The only ground upon which such a plant, in the nature of things, could be established, being owned by other nations, provision was made by the act for securing the necessary right of way from one or the other of the two nations controlling the only available sites for such a plant. The act did not even contemplate a future acquisition of that territory as United States territory, but only permission from the admitted sovereign of the territory to locate and operate the commercial plant there. The thing provided to be acquired was

> "the right to excavate, construct and perpetually maintain and operate and protect thereon a canal, which control shall include the right to perpetually maintain and operate the Panama railroad if the ownership thereof or of a controlling interest therein shall have been acquired by the United States."

The position taken by the Court of Appeals, it is submitted, cannot be defended because, first, this is not the territory of the United States; second, the thing

proposed to be built is not a public highway, but a transportation plant, which Congress has no authority to build and operate in the territories or any place else; and, third, even if instead of this transportation plant, it was intended to build a common public highway under these circumstances, and if an absolute cession of the territory had been secured, the act could still not be defended as an incident to the right to govern the territory because, under these conditions, such a strip so acquired would be a mere incident to the road and not the road an incident to the strip.

The canal can't sustain the strip and the strip sustain the canal at the same time.

"But sufficient ur to the day is the evil thereof." When, if ever, this strip is made American territory as part of this commercial project, and as an incident to the project, it will be time enough to consider the extent of the power of Congress in the territory of the United States; whether Congress has any more authority to use the public treasury as a capital for carrying on commerce in Arizona than in Kentucky or Hindostan; whether the formal cession of such a strip, manifestly and confessedly a mere incident or step in the establishment and operation of this commercial plant, would be regarded in law as anything more than it plainly would be in fact, a mere evasion; whether such a "covert attempt to legislate on commerce under the appearance of legislating on territories" would be treated according to its name or according to its substance; or whether the court would act upon the rule in *McCullough* v. *Maryland*, and declare that "Congress, under the pretext of executing its powers to make needful rules and regulations respecting the territory

of the United States having passed laws for the accomplishment of objects not intrusted to the goverment, it has become the painful duty of this tribunal, a case requiring such decision having come before it, to say that such an act is not the law of the land." These and similar questions as to the extent of the authority of Congress under the power to make needful rules and regulations respecting the territory of the United States can very properly be left until a case presenting them arises. For the present it is sufficient to say that this is not the territory of the United States and the only question is as to the constitutional authority of Congress to build and operate transportation plants in foreign countries.

V

Then where is this power? The power to make laws necessary and proper, etc.? But that adds nothing. A law necessary and proper for carrying into execution the power to regulate commerce, is a commercial regulation, etc.

It is submitted the necessary authority for this measure can not be found without adopting a system of construing the constitution that wholly undermines it and amounts to its practical repeal.

It has been said that it greatly concerns the honor and credit of the United States that this canal be built.

I don't believe it. I recognize no obligation resting on the United States to exact taxes from the people for any purpose, except the promotion of their own interest. I deny the legal or moral right of the government to require of a single citizen the contribution of a dollar or

to take from the treasury one dollar to promote the commercial or military interest of any foreign nation, or to promote any one's welfare except our own. If civilization wants that costly speculation carried through and has any mandates to issue on the subject, civilization ought to pay for it. There is no trust or duty to anybody in the premises.

But we, as a nation, have, in our keeping, something of much more inportance that we do hold in trust for the whole world—the principle of constitutional government. We are charged with the duty of demonstrating that a government of limited powers is a practical fact, and that the governing agents can be kept within the limits of their authority.

This does not mean that if the majority really want anything the minority should rule. If the matter proposed is unconstitutional, a way is provided for amendment and for giving any additional powers the people may think expedient; the only effect of a ruling that the thing proposed is beyond the powers of Congress being to require the people to stop and carefully consider the matter before determining that their welfare calls for the additional grant.

If the matter is within constitutional authority and its policy is favored by the majority and the proper authorities have determined it to be for the best, the dissenting minority must, of course, yield its views. If it is not within those limits, it is the plain duty of all to drop it or obtain the authority in the proper way.

This language, used by a great American, is in point:

> "I regard an appeal to the source of power in cases of real doubt, and when its exercise is deemed indispensable to the general welfare, as among the

most sacred of our obligations. Upon this country more than any other, has, in the providence of God, been cast a special guardianship of the great principle of adherence to written constitutions. If it fail here, all hope in regard to it will be extinguished. That this was intended to be a government of limited and specific and not general powers, must be admitted by all, and it is our duty to preserve for it the character intended by its framers. If experience points out the necessity for an enlargement of these powers, let us apply for it to those for whose benefit it is to be exercised, and not undermine the whole system by a resort to overstrained constructions." Jackson's Message to Congress, December 8, 1829.

Messages of Presidents, Vol. 11, p. 452.

And higher still this:

"If, in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But, let there be no change by usurpation, for, though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can, at any time, yield. * * * One method of assault may be to effect in the forms of the Constitution alterations which will impair the energy of the system and thus to undermine what cannot be directly overthrown."

From the farewell message from Mt. Vernon.

It may be true, as others believe, that it is of great public importance that this work should be done.

But, conceding anything and everything that has been or may be claimed as to its value to our commerce, to our defense and to our fame; yet, to every man and woman in the United States and to every man and

woman throughout the world who looks to us to disappoint the prophecies of failure of constitutional government, it is of infinitely greater consequence that the fundamental law of the land should be obeyed.

Respectfully submitted,

WARREN B. WILSON,
Appellant.